Petition

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

SPRINGDALE SCHOOL DISTRICT NO. 50
OF WASHINGTON COUNTY ..... Petitioner

V.

SHERRY GRACE, A MINOR, AND ALBERT GRACE AND JOANN GRACE, INDIVIDUALLY AND AS PARENTS OF SHERRY GRACE

ARKANSAS STATE DEPARTMENT OF EDUCATION a/k/a DEPARTMENT OF EDUCATION; STATE BOARD OF EDUCATION; WAYNE HARTSFIELD AS CHAIRMAN OF THE STATE BOARD OF EDUCATION; MRS. JAMES W. CHESTNUTT, JIM DUPREE, T. C. COGBILL JR., MRS. ALICE L. PRESTON, HARRY A. HAINES, DR. HARRY P. McDONALD, ROBERT L. NEWTON AND WALTER TURNBOW AS MEMBERS OF THE STATE BOARD OF EDUCATION; DON R. ROBERTS, DIRECTOR OF THE DEPARTMENT OF EDUCATION ..... Respondents

ON WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI THE EIGHTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

The principal questions presented for review are:

1. Did the Circuit Court err in equating a free appropriate public education under the Education for All Handicapped Children's Act to a merely appropriate education or a merely appropriate academic exposure?

2. Did the Circuit Court err in holding that to educate a child in a one-on-one educational environment is a free appropriate public education and further that such an arrangement satisfies the mainstreaming requirements of the Education for All Handicapped Children's Act?

3. Did the Court err in holding that the Arkansas act for the education for all handicapped children, Ark. Stat. 80-2114 through 80-2139 was irrelevant and could not be considered in light of the adoption of the federal statute?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to this proceeding before the Court of Appeals and the District Court.

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PETITION FOR WRIT OF CERTIORARI THE EIGHTH CIRCUIT COURT OF APPEALS

OPINIONS BELOW

The opinion of the United States Eighth Circuit Court of Appeals is reproduced in its entirety in Appendix "A" and appears in the Official Reporter at —— F.2d —— (August 7, 1981).

The opinion of The Hon. Paul X Williams, U. S. District Judge for the Western District of Arkansas, Fayetteville

Division, appeared at 494 F. Supp. 266 of the Official Reporter and is included in this appendix.

The decisions of the administrative officials, the State Department of Education on administrative appeal and the hearing officer at the due process hearing are also included in the appendix.

JURISDICTIONAL STATEMENT

The decision sought to be reviewed was entered by the United States Court of Appeals for the Eighth Circuit on August 7, 1981, and this petition for Writ of Certiorari is filed within 90 days of that day. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. 1254(1) and pursuant to Rule 17 of the Rules of the Supreme Court adopted April 14, 1980, effective June 30, 1980, with the revisions of November 21, 1980, under Subsection C, which states:

> "When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court . . ."

Jurisdiction was originally vested in the federal courts to hear the issues involved in this cause pursuant to 20 U.S.C. 1415(e)(2).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The issues involve the Education for All Handicapped Children's Act, which is codified at 20 U.S.C. 1401 through 1416, but the pertinent sections involved are 20 U.S.C. 1401(16), (17), (18) and (19); 1412; 1413; 1415(e)(2); 1418.

The regulations involved are 45 C.F.R. 121a.4, 45 C.F.R. 121a.14(a)(1); 45 C.F.R. 121a.360(a)(3), (4), (5), (b); 45 C.F.R. 121.361; 45 C.F.R. 121a.551 and 45 C.F.R. 121a.552(d).

The Arkansas statutes involved are Ark. Stat. 80-2115 through 2139, but the pertinent sections involved are 80-2118 and 80-2123.

Since the provisions involved are lengthy, their pertinent text is set forth in the Appendix in accordance with Rule 21.1(f).

STATEMENT OF THE CASE

Sherry Grace was born on January 19, 1970, to Albert and Joann Grace, and at the time of her birth, Sherry was profoundly (totally) deaf. This means she has never heard and will never be able to hear the spoken word. She cannot be helped by amplification or hearing aids.

Even though Sherry was born deaf, her parents took no courses in sign languages until the fall of 1979, and Sherry received no formal education until she was four years of age.

At that time she was placed in the Bates program located in Fayetteville, which is an oral program. An oral program is one which adheres to lip reading, speech and some auditory aids. After two years at Bates, Sherry had made little, if any, academic progress, had poor socialization skills and the Bates people determined she should be referred to the Arkansas School for the Deaf where she would receive a total communications program. A total communications program is an approach of giving a child not only

lip reading, which is furnished in an oral program, but also sign language, finger spelling and a very visual approach.

At the time Sherry left Bates to attend the Arkansas School for the Deaf, she was six years of age but was functioning as a child of two years and two months. She attended the Arkansas School for the Deaf in Little Rock for three years beginning at age six, and at the time she left, she was functioning on a grade level of 2.5 in reading and 2.6 in arithmetic, and she had developed socialization skills since she had other students with whom she could communicate.

At the end of three years, her parents decided that they did not like Little Rock and decided to return to Northwest Arkansas. Prior to leaving Little Rock, the parents were advised by the teachers and administrators that Sherry was doing well in the School, was making excellent progress, and if the parents were not happy with Little Rock, Sherry should be left as a residential or dormitory student. In spite of the fact that the Graces were happy with the progress Sherry had made at the Arkansas School for the Deaf and thought the School was wonderful and against the recommendation of the administrators and teachers and without any assurances of any other type of program being in existence in Northwest Arkansas or, for that matter, anywhere else in the state, the parties removed Sherry from the Arkansas School for the Deaf.

Sherry was placed in the regular classroom in the fourth grade in the Springdale school system and according to her teacher, who testified at the due process hearing, made very slow if any progress in reading and language. The teacher and her aide also testified that Sherry had very little, if any, interrelationship or any interaction with

the other students since the other students could not sign and Sherry had hardly any oral communication skills.

In fact, at the time of the due process hearing, Mrs. Grace testified that the only words Sherry could say were "Mama", 'Dada","Bye-bye", "Nite-nite" and possibly a few others. The expert who was called by the Graces to testify at the due process hearing testified that Sherry had no oral skills, very little verbal skills and no residual hearing whatsoever and that she had regressed since being removed from the Arkansas School for the Deaf and that in his opinion as between a one-on-one situation or the Arkansas School for the Deaf the Arkansas School for the Deaf was the appropriate placement.

At the time of the trial in Federal District Court held on May 8 and 9, the Judge noted that Sherry had great difficulty in attempting to testify and that while attempting to testify most of her communications were by head gestures rather than by signing.

All the experts on deaf education, who testified at either the due process hearing or the hearing in the Federal District Court, testified that the appropriate placement for Sherry was the Arkansas School for the Deaf in Little Rock and that a one-on-one placement was not appropriate since it deprived a child of interaction not only with nonhandicapped students but with handicapped students.

The lower courts both found that the thing Sherry needed most was to be *immersed* into an environment that would help her develop her communication skills. Both courts agreed that this could best be accomplished at the Arkansas School for the Deaf but that it could be accomplished in Springdale, and therefore, Sherry should remain

in the Springdale School System. This decision was made in light of the fact that there was no evidence that Sherry has anyone with whom she can meaningfully communicate other than her mother and her certified trained teacher for the deaf, which she is now being furnished. The court of appeals noted that there is no definitive answer to the meaning of a free appropriate public education under the act (op. 6) and, therefore, adopted the definition set down in the case of *Rowley v. Board of Education of Hendrick Hudson Cent. S.D.*, 483 F. Supp. 528 (S.D.N.Y. 1980).

The courts decision to term one program "best" and the other "merely appropriate" reflects neither the spirit nor the letter of the act. Further, such a decision totally ignores other district court cases deciding what a free appropriate education is under the act and further ignores the applicable Arkansas law, which requires that in Arkansas when there are two appropriate placements the appropriate placement which must be chosen is that which is *most* appropriate. All the experts who testified stated that it is not appropriate to educate a child alone in a one-on-one environment, but yet this is exactly what the lower court has done by its decision.

It is, therefore, necessary for this Court to remedy that error and to give a definitive definition of the act's meaning of free appropriate public education and how and if that definition may be expanded by state law and how such definition applies to a case of this nature and specifically to Sherry Grace.

REASONS FOR GRANTING THIS WRIT

1.

DID THE CIRCUIT COURT ERR IN EQUATING A FREE APPROPRIATE PUBLIC EDUCATION UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN'S ACT TO A MERELY APPROPRIATE EDUCATION OR A MERELY APPROPRIATE ACADEMIC EXPOSURE?

The Eighth Circuit, in its opinion, adopted Judge Brodrick's definition of free appropriate education as handed down in *Rowley v. Board of Education of Hendrick Hudson Cent. S.D.*, 485 F. Supp. 528 (S.D. N.Y. 1980) and as affirmed by a 2 to 1 vote of the Second Circuit. The reliance on such a definition is interesting for two specific reasons. First, the definition laid down by Judge Brodrick is based on a regulation set forth under the Rehabilitation Act[1], not the Education for All Handicapped Children's Act; and secondly, the Second Circuit in affirming Judge Brodrick's decision held that the case was not of precedential value but was limited solely to the facts of *Rowley*.[2]

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[1]45 C.F.R. 84.33(b): Appropriate Education. (1) For the purpose of this subpart the provisions of an appropriate education is the provision of a regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Section 84.34, 84.35 and 84.36.

[2]The following footnote appeared as Footnote 7 to the opinion of the Second Circuit Court of Appeals decision, handed down July 17, 1980, Docket No. 80-7098, **Amy Rowley v. The Board of Education of Henry Hudson Central School District, Westchester County and the Commissioner of Education of the State of New York** at Page 4517, "A majority of the panel of this court which heard this appeal on May 1, 1980 voted shortly thereafter to affirm the judgment of the district court and to do so pursuant to a provision of the rules of our court which would preclude citation of our decision as authority in any other case, thus recognizing what we believe to be the lack of precedential character of our decision in view of the unique facts of this case. We continue to adhere to this view."

Yet in light of those deficiencies in the *Rowley* decision, it has now been followed by the Eighth Circuit Court of Appeals.

The inherent error of Judge Brodrick's definition is that it is based on an act with a totally different purpose and, of equal importance, the definition as it appears in the regulations states that this definition not only does not apply to the entire act but only "for the purpose of this subpart".

The intent of the instant act is manifestly different from that of the Rehabilitation Act. The Rehabilitation Act mandates rehabilitative services designed to maximize the potential for the employment of handicapped persons. The EHA, on the other hand, requires provisions of special education and relative services in order to enable handicapped pupils to benefit from education. The goal adopted by Congress was that the educational program provided to handicapped children enable them to become independent and productive citizens within the limits of their handicap. The Senate report on the proposed legislation stated:

> "With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others through such services would increase their independence thus reducing their dependence on society."
>
> S. Rep. No. 94-168, 94th Cong., 1st Sess., Reprinted in (1975) U. S. Code Cong. and Ad. News, 1425, 1433.

As Senator Williams stated in the floor debate:

> "Providing appropriate educational services now

> means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds." 121 Cong. Rec. 19492 (1975).

Other senators concurred in these statements with such statements as:

> "Give these children the educational services they need to compete in today's changing world." 121 Cong. Rec. 37410 (1975).

The House also agreed in this idea and part of the record on the discussion there includes this statement:

> "With proper educational services provided now, at a young age, these children can become productive citizens, contributing to society instead of being left as burdens on our society." 121 Cong. Rec. 25541 (1975).

Not only is there recognition by the Eighth Circuit that there is no definitive answer or definition as to what constitutes a free appropriate education, but more importantly, the Eighth Circuit recognized the divergence of court definitions in this area and stated, "The results are far short of uniform, they run a broad spectrum."[3] The Court then referred to the following case definitions: "maximization of learning potential," *Kruelle v. Biggs,* 489 F. Supp. 169 (D. Del. 1980); "most appropriate," *DeWalt v. Burkholder,* 3 E.H.L.R. 551:550 (E.D. Va. 1980), and "sufficient to make handicapped persons independent and self-suf-

[3]Page 6 of the Court of Appeals Opinion. (Court of Appeals Opinion referred to herein as "op". The references to the District Court opinion are preceded by the letters "dc".)

ficient," *Armstrong v. Kline,* 476 F. Supp. 583 (E.D. Penn. 1979).

As can be seen, if either the *DeWalt* or the *Kruelle* test had been adopted, the result in the Grace case would be totally different from that reached by the Court, and in fact, if the Rowley definition had been "appropriately" applied, the result would have been different.

Therefore, it is imperative that this Court set a nationwide definitive definition on what constitutes a free appropriate public education under the Education for All Handicapped Children's Act so that we don't have one decision deciding what is appropriate to educate a child if the suit is brought in Arkansas and another decision if that suit is brought in Delaware, Pennsylvania or Virginia.

There are hundreds of thousands of handicapped children whom this law affects, and there are thousands of school districts and school boards that need guidance and specificity on a nationwide basis rather than a case-by-case basis or a geographical basis as to what the requirements for a free appropriate education under the federal law are.

Both the Eighth Circuit and the District Court stated that what Sherry was receiving was "a mere appropriate scholastic exposure". (dc. 16, op. 6) The exposure which Sherry is receiving is certainly inferior to that which could be provided at the Arkansas School for the Deaf as reflected on the following chart:

ARKANSAS SCHOOL FOR THE DEAF AT LITTLE ROCK	AT SPRINGDALE SCHOOL
I. In the Area of Academics:	
(a) Many trained teachers	(a) 1 trained teacher year after year
(b) Courses in art, P.E., science, social sciences, health with different teachers	(b) Art, P.E., social sciences, health (no science and all classes taught by one teacher)
(c) Discipline by each teacher, principal, supervisors, counselors and dorm parents	(c) Discipline only by teacher or interpreter (regular classroom teacher, principal and counselor cannot sign and would have to discipline through an interpreter)
(d) Fellow students who can sign	(d) No students who can sign
(e) 5 to 8 in a class	(e) 20 or more
(f) Class arranged to meet needs of deaf children and semi-circle seating	(f) "Normal" class arrangement
(g) All types of equipment	(g) Limited equipment
(h) Accredited by North Central Associated and by Deaf Certification agency	(h) Accredited by North Central

ARKANSAS SCHOOL FOR THE DEAF AT LITTLE ROCK	AT SPRINGDALE SCHOOL
II. Activities After Class:	
(a) 115-120 students who can sign	(a) 0 students who can sign
(b) Deaf adults as role models	(b) No deaf adults
(c) (1) Brownies (2) Parties (3) Games (4) Student (dorm) government	(c) ?
(d) Captioned movies	(d) ?
(e) TV de-coders and interpreters for TV in dorms	(e) ?
(f) Full time learning	(f) Day ends at 3:00

Not only does the chart reflect the great divergence as to what could be furnished Sherry at the Arkansas School for the Deaf and what she can be furnished at Springdale, but it also reflects that even if the *Rowley* definition is correct, which petitioner submits it is not, then Sherry is certainly not being furnished an academic exposure commensurate with that furnished to nonhandicapped students. Such a statement is not only clearly erroneous but ignores the devasting effect of deafness.

In testimony from all the experts, including Dr. Merv

Garretson, the Assistant to the President at Gallaudet College, who is a long time deaf educator and who himself was born deaf testified that deaf people have, at a minimum, the following problems: (1) limited use of the English language; (2) little knowledge of the meaning of words; (3) inability to communicate one's name verbally; (4) inability to verbalize such simple words as chair, table, mother, milk; (5) cannot form or structure words into complete sentences; (6) cannot receive communications through other's speech; (7) cannot give communications to others through speech; (8) cannot lip read, since the child has never heard words, he does not know what shape the words make or does not know the meaning of words; (9) cannot receive hearing repetitions which are so important in the education of children and (10) can receive visual stimulus only.

We all recall how we taught our young children over and over again by repetition, verbal repetition, what certain things mean and how to say certain words, and we can visualize the difficulty in teaching a young child who is deaf and has been deaf since birth many of the common things that are heard and learned by hearing children.

Contrary to the lower courts' opinions, Sherry is not being furnished and cannot be furnished at Springdale an education commensurate to that being furnished to non-handicapped children, *i.e.*, the modified *Rowley* test. Non-handicapped children can talk and communicate in the halls while Sherry will not be able to communicate with other students unless the interpreter is present. The non-handicapped students will have interaction with other students and with many teachers in the classroom in the academic arena, but not Sherry. (dc. 10-11) The nonhandi-

capped students will be able to engage in extracurricular and outside activities on a meaningful basis, but not Sherry. (dc. 11) Nonhandicapped students when they go home not only have interaction with other children and parents but can watch and hear programs of all types on television and radio, but not Sherry, and most importantly, nonhandicapped students can see and hear and communicate with adults on a meaningful basis and thus have role models, but not Sherry. (dc. 11)

As both lower courts stated in their decisions, the most important thing Sherry needs to learn at this stage of her life is the art of communication. (dc. 9-10, op. 6) But the lower courts, by their very rulings deprive Sherry of anyone with whom to improve her signing skills and art of communication save for one teacher.

Not only is the lower court's decision deficient for the reasons set forth above but it is not appropriate to educate a child alone, especially not in this instance.

2.

DID THE CIRCUIT COURT ERR IN HOLDING THAT TO EDUCATE A CHILD IN A ONE-ON-ONE EDUCATIONAL ENVIRONMENT IS A FREE APPROPRIATE PUBLIC EDUCATION AND FURTHER THAT SUCH AN ARRANGEMENT SATISFIES THE MAINSTREAMING REQUIREMENTS OF THE EDUCATION FOR ALL HANDICAPPED CHILDREN'S ACT?

The decision made by the District Court and the Eighth Circuit holds that Sherry shall be educated by a certified trained teacher of the deaf in a resource room for the entire day with the exception of lunch, recess and P.E. All of the

other activities, including all academic activities, are to be conducted in the one-on-one environment.

Every expert who testified at either the due process hearing or the trial in the District Court stated that a one-on-one situation was inappropriate for Sherry. Gary Blake, a professor at the University of Arkansas with responsibilities in teacher training in the area of deafness, was called as an expert by the Graces. Dr. Blake testified that he participated in both the evaluation referral conferences and also the pre-hearing conferences with Sherry and her parents and that he felt as of the time of the due process hearing considering the existing facilities the most appropriate referral for Sherry was the Arkansas School for the Deaf and that he certainly concurred with the Spingdale School System in that referral in consideration of existing facilities and programs. He went on to state:

> "I think in consideration of existing programs, yes, it would be least restrictive, I think in the setting she is in, uh, she is extremely restricted in ever acquiring linguistic skills. I don't think in the current setting she will develop academically at all and I don't think there is any hope of her developing linguistic skills we would want her to have in the current situation." (D. 201)[4]

Dr. Blake further testified that even if the current setting were modified by including a certified trained teacher for the deaf it would be inappropriate to educate Sherry in the Springdale Schools since:

> "If she were to be served there (Springdale

[4] "D" is the citation of the Due Process transcript, and "T" is the citation for the District Court transcript.

> Schools), she needs a tutoring type of situation with a trained teacher of the deaf, because she needs to develop speech, reading skills, develop her listening skills, develop language which would require some specialized techniques, and ideally some different communication modes that are used in the field of deafness. *I don't personally support that.*" (Emphasis added) (T. 329-330)

Dr. Blake stated that the reason that he would not support such an arrangement was (1) Sherry would be alone in a room with one person for the great majority of the day; (2) every parent who was ill-advised as to what was best for their child would want such a situation rather than to allow their child to go to residential school; (3) it would create an unfair and unrealistic burden on the school system and (4) "I'm *not so sure that* it wouldn't be detrimental to the child's best interests"; (5) he stated he would hate to see a situation "where every school district in Arkansas who has a deaf child is going to have to be required to hire a teacher for *that one child.*" (T. 331-332) Dr. Blake testified that a residential school has several advantages, to-wit, the comradery among the students, many teachers rather than one teacher year after year, the opportunity for social activities and interaction among similar handicapped students. (T. 319-320)

More importantly, Dr. Blake stated that Sherry needs a trained teacher of the deaf, a modified curriculum and different, to-wit, slower pacing. (D. 203) For the great majority of the day, Sherry would be alone in the resource room. Not only would she not have the benefit of being with other deaf or hearing impaired students, she would not even be with hearing students. The one-on-one situa-

tion is certainly the worst of both worlds, and not only is it contrary to the act, but it is contrary to common sense. A child needs meaningful interaction with others, not merely to have them in her presence.

Both the District Court and the Court of Appeals relied heavily on the mainstreaming requirement of the act. This is interesting in light of the fact that the requirement of mainstreaming only appears once in the entire act,[5] although granted from the regulations it does appear to be an important requirement. However, Sherry's one-on-one environment certainly does not comply with mainstreaming since she is alone for the great majority of the day. Proximity, having a child in the same building, does not equal integration, a true intermingling of ideas and relationships. As was brought out in the legislative history of the 1975 House hearings:

> "Everybody is interested in something called 'mainstreaming' today, and a lot of the assumption is that we are going to take all of the handicapped children who are in handicap programs and we are going to *dump them* into the programs that did not work.
>
> This is not mainstreaming, and that is not appropriate education. *What is appropriate is dealing with children in the environments in which they need an education.*" (Emphasis added)

Tom Hicks, the Superintendent of the Arkansas School for the Deaf, testified that a one-on-one environment would

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[5]20 U.S.C. 1412(5)(B), which section is referred to in 20 U.S.C. 1414 (a)(1)(C)(iv).

simply not work and neither constituted mainstreaming nor the least restrictive environment. He stated:

> "I think to consider the term 'least restrictive environment' you have to consider *modifications or intrusions into the child's educational program.* Uh — and by this I mean, if a child were in our program this child *would not have one teacher all day long.* This child would have a homeroom teacher as such. But he also might have a second or third teacher in academic subjects. He would be exposed to a certified art teacher, certified P.E. teacher and all of these other ones which certainly would give him a broader range of experiences, which would not be such a limited exposure to the educational process. When you start talking about one teacher/one child, that child is soon going to outgrow that teacher. *A teacher simply can't have that much to offer year after year, day after day,* and you are going to find that that in itself is going to be *limiting to the child,* and I think the broader the exposure you give a child the broader the environment is going to become (T. 104) . . . I can't see but what it would be restrictive in fact that his expressive and receptive language, they are both going to be restricted at that point. He's going to be restricted in what he can communicate and what he's going to receive." (T. 104) (Emphasis added)

Other courts have considered this question and have held that a one-on-one environment or at least a situation where the child *did not have interaction during academic activities* was not an appropriate education.

The Court, in *Age v. Bullitt*, 3 E.H.L.R. 551:505, recognized that a program proposed for Michael Age was inadequate because it denied him the interaction necessary for an appropriate education. The Court stated that it was not only necessary for a child to have peer group interaction during such times as lunch, library, P.E. and recess but that it is *critical* that a child have *meaningful* contacts during academic studies:

> "While plaintiff would have some peer group exposure during certain times and classes, i.e., physical education or at a library period and lunch, the experts agree that it is critical that the plaintiff have peer group contact during academic studies themselves." (3 E.H.L.R. 551:505 at 505-506)

This is exactly what the experts stated in regard to Sherry Grace.

In fact, how could Sherry be immersed in a communications program or a communications environment when she is to be educated alone? The answer is simple. She cannot. In fact, in *Age*, Michael was not to be educated alone but he was to be educated with two other children, both of whom were to be instructed by the total communications method. Only Michael was to receive oral training. The Court there held that since he would have no basis for communication with the children, to-wit, they were total communications, *i.e.*, signing, and Michael could not sign but only communicate orally he would be, in effect, isolated.

The exact same thing is true here. Here Sherry can only communicate by means of total communications, but

she is to be placed on an occasional basis among children who can communicate orally and who cannot sign. The *Age* Court stated:

> "The lynch pin of this controversy is whether the Bullitt County plan is 'appropriate'. An argument can be made that the Bullitt County plan is appropriate in that the so-called one-on-one relationship between plaintiff and his teacher coupled with exposure to those in his age group at specified times mentioned is an acceptable policy which assures compliance with the act.
>
> On the other hand, the impressive testimony of all the experts is persuasive of the proposition that the method of educating the plaintiff by the defendants is not the most effective method . . ."[6]

This is exactly the same issue that confronted the Grace Court, but since *Grace* was decided by a judge in Arkansas as opposed to a judge sitting in Kentucky, a totally different result was reached.

Still another decision consistent with *Age* and inconsistent with *Grace* is *DeWalt v. Burkholder,* 3 E.H.L.R. 551:550 (March 13, 1980). In *DeWalt* a profoundly deaf child's primary problem was delayed language development, and the Court found that the quicker her language and communication skills could be developed the faster her academic progress and educational goals could be achieved. The *DeWalt* Court recognized that the "opportunity for a child to interact in the community with her peers . . . is crucial as a stimulus to learning." The Court also recognized that the DeWalt's child's language deficiencies would not

[6] 3 E.H.L.R. 551: at 506.

be resolved in a dayschool setting, even with the support of her family and various community services, such as sign language courses for her parents, and the Court further found that Christine's severe language problems could be appropriately provided for only by the 24-hour "*total immersing*" environment that the School for the Deaf could furnish.

The trial court and the court of appeals affirmed that what Sherry needed was immersion in a total communications program, and she can only receive this in the appropriate manner at this stage of her life at the Arkansas School for the Deaf.

Petitioner would submit that free appropriate public education when translated into normal terms means a child is given the necessary education for the individual child based on the totality of the circumstances surrounding that child with special emphasis on the child's unique needs. If this is done, the most appropriate placement, and in fact the only appropriate placement for Sherry Grace, is the Arkansas School for the Deaf in Little Rock, at least at this stage in her life.

In order for the act to become meaningful and not fragmented, this Court must set forth a definitive and *an appropriate* definition to be applied uniformly throughout this country.

3.

DID THE COURT ERR IN HOLDING THAT THE ARKANSAS ACT FOR THE EDUCATION OF ALL HANDICAPPED CHILDREN, ARK. STAT. 80-2114 THROUGH 80-2139 WAS IRRELEVANT AND COULD NOT BE CONSIDERED IN LIGHT OF THE ADOPTION OF THE FEDERAL STATUTE?

The appellate court affirmed the District Court in holding that the Arkansas law could not be considered because it was irrelevant. Petitioner submits that such finding is erroneous and misunderstands the importance that state law plays. While state law can never be used to *reduce* the requirements of the act, it can be used to *increase* and *amplify* the applicable provisions of the act to particular situations since the federal act, by its very terms, is general in nature. In fact, the act defines an appropriate education as essentially one which "meets the standards of the state education agency."[7]

To be eligible for assistance under the act the state must submit to the Commissioner evidence that it has developed a plan which sets forth in detail the policy and procedure, *i.e.*, its standards, to insure that each handicapped child receives "a free appropriate public education."[8]

The regulations under the act[9] provide a complete scheme for submission of the state's plans to the Commissioner and identified what the state's plan must contain in order to merit approval. The question of whether a local school district is providing an appropriate education must

[7] 20 U.S.C. 1401(18).

[8] 20 U.S.C. 1412(2)(B) and 1412(3).

[9] 45 C.F.R. 121(a).120-121.

be resolved by inquiring whether such education is in conformity with the state's requirements, if the state's plan has been approved by the Commissioner. In fact, most cases that have considered the application of the EHA have discussed in detail the state law.[10]

If the state law is irrelevant, why has it been cited and discussed in so many cases, including *Rowley* by the Second Circuit? The fact is the federal act sets forth certain minimum standards which must be applied uniformly. However, the act allows the state to increase the standards and to require more out of its school districts than the federal act requires and such is not only allowed but is anticipated by the act. It is somewhat similar to the federal garnishment law that prohibits an individual from having more than a certain percentage of his disposable net income removed from his possession by garnishment, but the federal courts, while holding that this garnishment act has pre-empted the field, have further held that the state might set a higher standard and protect the wage-earner by granting an exemption on more than the minimal amount protected by the federal law. The State of Arkansas has stated that a

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[10]**Breeden v. Maryland State Department of Education,** 3 E.H.L.R. 551: 262 and 551-273; **William A. H. v. School Board of Clay County,** 3 E.H.L.R. 501:209; an untitled case which appears 3 E.H.L.R. 501:174 from Michigan; **Kampmier v. Harris,** 403 N.Y.S. 2d 638 (1978); **Concerned Parents and Citizens for the Continuing Education at Malcolm X (PS 79) v. New York City Board of Education,** 3 E.H.L.R. 551:535 (U.S.D.C.S.O.D.N.Y.); **Bishop v. Starkville Academy,** 442 F. Supp. 1176 N.D. Miss. 1977; **Stemple v. The Board of Education of Prince George County,** U. . . of Appeals for the 4th Cir., No. 79-1208, June 2, 1980, appealed from **Stemple v. Board of Education of Prince George County,** 464 F. Supp. 258 (D. Md. 1979); **Jose P., A Minor Under the Age of 21 by His Mother Pascuala S. v. Gordon M. Ambach,** 3 E.H.L.R. 551:412 (U.S.D.C.E.D.N.Y. Dec. 14, 1979).

child is entitled to the most appropriate education,[11] and when that standard is applied based on the findings of the lower courts Sherry should be educated at the Arkansas School for the Deaf.

This Court must resolve the conflict as to the permissible amplification of the federal act by a state law and reverse the Eighth Circuit's holding that state law is irrelevant.

CONCLUSION

Since there is a great discrepancy in the application of the Education for All Handicapped Children's Act across our country depending upon in what district court and in what geographical area a case is heard and since the act needs a uniform interpretation and has not received one at this time and since there are varying district court cases applying differing definitions and since the definition adopted by the Second and Eighth Circuit is one based on the Rehabilitation Act as opposed to the Education for All Handicapped Children's Act, this Court should accept this case and set forth a definitive definition as to what constitutes a free appropriate public education under the federal act. Of equal importance, this Court must determine whether or not state law is irrelevant as stated by the District Court and the Eighth Circuit Court of Appeals, and if it is not irrelevant, then the Court should set forth the permissible amplification of the federal act by state law.

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[11] Ark. Stat. 81-2123, "It shall be the responsibility of the school district and the state to provide the **most** appropriate services based on a careful evaluation of the child's needs . . ." (Emphasis added)

For those reasons, petitioner submits that a writ of certiorari should be granted to review the judgment of the Eighth Circuit Court of Appeals.

Respectfully submitted,

SPRINGDALE SCHOOL DISTRICT
No. 50 OF WASHINGTON COUNTY

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By: JAMES M. ROY, JR.

Counsel for Petitioner

Appendix

APPENDICES

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-1777

Springdale School District No. 50 of Washington County ..... *Appellant*

v.

Sherry Grace, a Minor, and Albert and JoAnn Grace, Individually and as Parents of Sherry Grace

Arkansas State Department of Education; State Board of Education; Wayne Hartsfield as Chairman of the State Board of Education; Mrs. James W. Chestnutt, Jim Dupree, T. C. Cogbill, Jr., Mrs. Alice L. Preston, Harry A. Haines, Dr. Harry P. McDonald, Robert L. Newton and Walter Turnbow as Members of the State Board of Education; Don R. Roberts, Director of the Department of Education ..... *Appellees*

Appeal from the United States District Court for the Western District of Arkansas

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Submitted: June 17, 1981
Filed: August 7, 1981

Before HEANEY and HENLEY, Circuit Judges, and NICHOL,* Senior District Judge.

NICHOL, Senior District Judge.

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*Fred J. Nichol, Senior District Judge, District of South Dakota, sitting by designation.

This is an appeal by the plaintiff-appellant, Springdale School District No. 50 of Washington County (Springdale School), from the judgment of the district court[1] in favor of the defendant-appellees, Sherry Grace and her parents, the Arkansas State Department of Education and its director, and the State Board of Education and its members. The district court found that under the provisions of the Education for All Handicapped Children Act, 20 U.S.C. sections 1401-1461 (1970) (Act), the Springdale School could provide Sherry Grace with a free appropriate education. Based upon this finding the district court affirmed the decision of the Arkansas Department of Education with respect to the Individualized Education Program (IEP) developed for the 1979-80 school year for Sherry Grace. We affirm.

The facts giving rise to the present controversy are well set out by the district court opinion. *Springdale School Dist. v. Grace*, 494 F. Supp. 266 (W.D. Ark. 1980). Sherry Grace is an eleven year old girl who is profoundly and prelingually deaf, having either been born deaf or lost her hearing before she developed speech. She has a 95% loss of hearing which renders her completely deaf for all purposes.

Sherry received no formal education or training in communication until, at the age of four, she was enrolled in a special program for children with hearing impairments at Bates Elementary School in Fayetteville, Arkansas. Since the children in this program retain some hearing they are orally instructed. A person like Sherry who is profoundly deaf can only visually receive instructions. As the district court found, "(I)f one is profoundly and pre-

[1]The Honorable Paul X. Williams, District Judge for the Western District of Arkansas.

lingually deaf, he lacks the concept of language and must not only receive visual instruction, but also must be taught the most rudimentary matters concerning language." *Springdale School Dist. v. Grace, supra* at 267. The Bates program for hearing impaired children proved inadequate to meet Sherry's needs, and although in the program for two years Sherry made little or no progress. When she left the Bates program Sherry's language level was that of a child of two years and two months.

When Sherry was six years old her parents moved to Little Rock, Arkansas, and they enrolled Sherry in the Arkansas School for the Deaf as a day student. Sherry attended the School for the Deaf for three years. The school employs the total communication system.[2] While there she progressed from having a language level of a two year old to being able to read at the second grade level. Since she was able to communicate with others and participate in the life of the school, her confidence and social ability also developed.

After three years in Little Rock, Sherry's parents, over the protests of Sherry's teacher, took Sherry out of the School for the Deaf and moved back to Springdale, Arkansas. There they enrolled Sherry in the fourth grade at the Springdale School.

After testing Sherry and consulting with her parents the Springdale School formulated an IEP for Sherry. The IEP noted that Sherry should be taught by a certified teacher of the deaf who employs total communication. Sherry's lack of the skills of the average fourth grader in

[2]The total communication system is a method of visual communication encompassing signing, fingerspelling, visual cues, touching and mouthing.

reading, spelling and arithmetic, and her below level general knowledge prompted the Springdale School in the IEP to state that the Arkansas School for the Deaf was the proper school to meet Sherry's unique needs.

Although the Graces otherwise agreed with the Springdale School's assessment of Sherry's needs, they disagreed with that portion of the IEP which stated that the School for the Deaf was the proper school for Sherry. Under the provisions of the Act a temporary IEP was formulated allowing for Sherry to remain at the Springdale School while her parents sought review of the disputed portion of the IEP. *See* 20 U.S.C. section 1415 for procedural safeguards. After proper notice and pre-hearing conferences a due process hearing was held on November 7, 1979. The hearing officer reversed the disputed portion of the IEP holding that the Springdale School was wrong and that Sherry could receive an appropriate education at the Springdale School. The Springdale School appealed to the Coordinator, Department of Education Special Education Section, who affirmed the decision of the hearing officer. Upon affirmance, in January, 1980, a full-time certified teacher of the deaf was provided for Sherry.

In February, 1980, the Springdale School initiated this action in district court pursuant to section 1415(e)(2) of the Act seeking review of the appeals officer's decision that Sherry be educated at the Springdale School and not sent to the School for the Deaf. The district court initially found that the Arkansas School for the Deaf could provide Sherry with the *best free education. Springdale School Dist. v. Grace, supra* at 271. The court, however went on to hold that the Act requires simply that the State, through its local educational district, provide each handicapped

child with a *free, appropriate education. Id.* at 272. The court then held that, under the standard set forth in the Act, a preponderance of the evidence proved that the Springdale School could provide Sherry with an appropriate education. The court also found that the Springdale School satisfies the requirements of mainstreaming found in the Act. 20 U.S.C. sections 1412(5)(B) and 1414(a)(1)(C)(iv). *Id.* at 273. Finally, the district court granted the Grace's motion for an injunction forcing the Springdale School to provide Sherry with a certified teacher of the deaf for the 1980-81 term only. The court denied the Grace's request for attorney fees.

The Springdale School filed this timely appeal. Three issues are raised for consideration by the Court:

1. Whether the district court's ruling that Sherry could be appropriately educated at the Springdale School as opposed to the School for the Deaf is an erroneous interpretation of the law and contrary to the Act and/or Arkansas law?

2. Whether the district court's finding that the Springdale School could provide Sherry an appropriate education is clearly erroneous?

3. Whether the district court erred in holding that it had no jurisdiction to consider the Arkansas law?

The Act requires that Sherry be provided with a free appropriate education. 20 U.S.C. section 1412.[3] In order to

[3]Section 1412 of the Act provides that "(I)n order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education. . . ."

determine what is appropriate to meet the handicapped child's needs the Act requires that an IEP be developed at least annually for the child. 20 U.S.C. section 1414(a)(5).[4] It is the 1979-80 IEP that is at issue here.

It is evidence from the well reasoned opinion of the district court that the question of what educational facility is appropriate for Sherry was carefully considered and analyzed. The district court found that the School for the Deaf would provide Sherry with the *best* education. In reaching this conclusion the court noted that the most important thing for Sherry at this stage of life was to learn language skills and that the School for the Deaf is the best place for that purpose. The School for the Deaf would also provide Sherry with proper role models since many of the people employed there are themselves profoundly deaf. Further, Sherry would be able to practice total communication in school as well as in many extra-curricular activities such as Girl Scouts.

The district court, although convinced that the best place for Sherry is the School for the Deaf, correctly followed the Act's requirements when it determined that it was not the State's duty to provide the *best* education, but instead states are required to provide an *appropriate* education.

A definitive answer to what constitutes an appropriate education is lacking in the Act and the regulations promul-

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[4]Section 1414(a)(5) provides that local educational units make application to the State educational agency. "Such application shall —

(5) provide assurances that the local educational agency . . . will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually. . . ."

gated thereunder.[5] Therefore, the courts, in reviewing claims brought under the Act have attempted to establish standards for determining what is an appropriate education. The results are far short of uniform. They run a broad spectrum. *Kruelle v. Biggs*, 489 F. Supp. 169 (D. Del. 1980) (maximization of learning potential); *Rowley v. Bd. of Ed. of Hendrick Hudson Cent. S. D.*, 483 F. Supp. 528 (S.D. N.Y. 1980) (full potential commensurate with opportunity provided to nonhandicapped children)[6]; *DeWalt v. Burkholder*, 3 E.H.L.R. 551:550 (E.D. Va. 1980) (most appropriate); *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Penn. 1979) (sufficient to make handicapped persons independent and self-sufficient).

The district court adopted, and we affirm the standard set forth in *Rowley v. Bd. of Ed. of Hendrick Hudson Cent. S.D., supra* at 534:

> "An 'appropriate education' could mean an 'adequate' education — that is, an education substantial enough to facilitate a child's progress from one grade to another and to enable him or her to earn a high school diploma. An 'appropriate education' could also mean one which enables the handicapped child to achieve his or her full potential. Between those two extremes, however, is a

[5]See 45 C.F.R. sections 121a.340-49, 121a.4, 121a.5, 121a.513, 121a.550-551 (1979) for the regulations promulgated under the Act. The regulations relevant to this case are cited in full in the district court's opinion **Springdale School Dist. v. Grace, 494 F. Supp. 266 (1980).**

[6]Affirmed by the Second Circuit in an unpublished opinion filed July 17, 1980. In its opinion the Court of Appeals holds that the district court's opinion was clearly supported by a preponderance of the evidence. Further, the court notes that since the case was not a class action its holding is limited to the facts of the case.

> standard which I conclude is more in keeping with the regulations, with the Equal Protection decisions which motivated the passage of the Act, and with common sense. This standard would require that each handicapped child be given the opportunity to achieve his full potential commensurate with the opportunity provided to other children."

The *Rowley* standard provides the handicapped child with the opportunity to achieve her full potential but takes into account that such a task is equally fair and feasible only to the extent that such opportunity must be commensurate with the opportunity granted to nonhandicapped in the same system. The district court noted, as did the court in *Rowley, supra* at 534, and we are greatly swayed by it, that:

> "The school provides the nonhandicapped child an opportunity to learn the basics and to learn them well enough so that he might excel in his secondary courses. But the Springdale school does not turn every one of its students into academicians or professionals, or even successful secondary students. The home life of the child, his parents' interests and the child's cultural and sociological environment often determine the child's academic success and attainment or lack of such."

Springdale School Dist. v. Grace, supra at 272. Sherry will be receiving instruction in reading, arithmetic, spelling, telling of time, health, social sciences and art by a certified teacher of the deaf along with instruction in manual communication, lipreading, writing and speaking. As the district court observed, although it is likely that Sherry could

learn more quickly at the School for the Deaf, both schools would be teaching her through certified teachers of the deaf. The fact that Sherry may not, like many nonhandicapped children, reach her full potential is not due to any error in the district court's interpretation of the Act or its finding that the Springdale School could appropriately educate Sherry, but instead may well result from forces outside the school environment. The Act cannot remedy a child's cultural and sociological environment nor force parents, by threatening to remove the child from the home, to become partners with the state in insuring that a child reach her full potential. We therefore agree with the district court that Sherry will be offered, through the extra services provided, an opportunity to achieve her full potential commensurate with the opportunity offered to all the Springdale School students and thus will receive an appropriate education at the Springdale School.[7]

Our holding today is further supported by the mainstreaming requirements of the Act. Sections 1412(5)(B) and 1414(a)(1)(C)(iv) of the Act require that "to the maximum extent" possible, without sacrificing the child's right to an appropriate education, the handicapped must be educated with the nonhandicapped. The regulations required that the handicapped child not only be educated as close to home as possible, but also that when possible the child should be educated in the school which he or she

[7]As was noted by the district court Sherry's parents have made very little effort themselves to learn to communicate with Sherry.

would attend if not handicapped.[8] At the Springdale School Sherry would be with nonhandicapped children for physical education, library, and possibly penmanship, science, health, social studies, music and art. At the School for the Deaf, however, Sherry would have virtually no contact with nonhandicapped children. This goes against the backbone of the Act which is to keep handicapped children out of institutions where often they are no more than prisoners serving life terms. Although Sherry's case does appear to be one in which an institution would better serve her needs, the Act's requirements are clear. The district court properly found that Sherry can receive an appropriate education at the Spingdale School which also allows her to be educated with nonhandicapped students.

The Springdale School's final allegation of error on the part of the district court involves the district court's

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[8] 45 C.F.R. Section 121a.513(b) provides that

Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, . . . are educated with children who are not handicapped.

. . .

45 C.F.R. section 121a.551 provides assurance that

(a) Each handicapped child's educational placement:

(1) Is determined at least annually;

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

. . .

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped. . . .

The only exception to the above requirements is "when the nature of or severity of the handicapped is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. section 1412(5)(B); 45 C.F.R. section 121a.513(b)(2). Since we hold that Sherry can, with the use of supplemental services, receive an appropriate education at the Springdale School the above exception would be inapplicable.

refusal to consider Arkansas law as it applies to this controversy. We find this argument to be without merit. The complaint filed by the Springdale School sought review, under section 1415(e) of the Act, of the administrative proceedings provided for under the Act. The applicable law and standards set forth thereunder are federal, and the district court was not required to apply state law. If every state had a different standard for determining "appropriate", the needs of some handicapped children "may not be adequately met if the local programs are measured against a statutory goal which is permitted to vary with the happenstance of the state in which the child lives." *Battle v. Com. of Pa.*, 629 F.2d 269, 284 (3d Cir. 1980) (Sloviter, Circuit Judge, dissenting). The district court was not incorrect in limiting its review to the applicable federal law.

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

SPRINGDALE SCHOOL DISTRICT ..... *Plaintiff*

v. Civil No. 80-5017

SHERRY GRACE ET AL ..... *Defendant*

AND

THE ARKANSAS DEPARTMENT
OF EDUCATION ..... *Defendant*

MEMORANDUM OPINION

In this case, the plaintiff, Springdale School District No. 50 of Washington County, Arkansas, seeks a holding that the appropriate education for Sherry Grace, a handicapped child, is provided at the Arkansas School for the Deaf instead of the Springdale Public School. The defendants, Albert Grace, Joann Grace, individually and as guardian ad litem for Sherry Grace, have counterclaimed seeking an injunction requiring the plaintiff to hire a special teacher qualified to teach Sherry Grace and to institute a summer program to make up the educational deficiencies they contend occurred during the 1979-1980 school term while their child attended the Springdale Elementary School.

Subject matter jurisdiction exists under 20 U.S.C. §1415(e)(2) and (4).

Sherry Grace was born to Albert and Joann Grace on January 19, 1970. The Graces lived in Washington County,

Arkansas. During Sherry's early infancy, she suffered from various ear infections and related problems. When she was two years old, her parents discovered that she was profoundly deaf, having either been born deaf or having lost her hearing before she developed speech. Sherry has a 95% loss of hearing which renders her completely deaf for all intents and purposes.

Sherry received no formal education or training in communication before the age of four. When she was four years old, she was enrolled in the Bates Elementary School in Fayetteville, Arkansas, which had a special program for children with hearing impairment. She lived with her parents in Springdale, Arkansas.

The Bates program for the hearing impaired was designed for children who retain some hearing (hard of hearing children) and not for the profoundly deaf. If a person is merely hard of hearing, he can be orally instructed, although amplification may be necessary. A hard of hearing person may more easily be taught lip reading and other skills which are designed to implement the hearing that exists. A person who is profoundly deaf can only visually receive information. If one is profoundly and prelingually deaf, he lacks the concept of language and must not only receive visual instruction, but also must be taught the most rudimentary matters concerning language. Because Sherry Grace is profoundly and prelingually deaf, the Bates program, geared to hard of hearing children, was inadequate and she made little or no progress after two years at the Bates school. Her language level was that of a child of two years and two months.

Unlike other handicaps, profound prelingual deafness renders the person extremely isolated. Hearing humans

rely almost exclusively on oral communication until they learn to read and write, and if untrained in sign language, can convey only the simplest ideas through gestures and signals. A profoundly deaf child who has not learned to read usually learns nothing other than those matters which a normal prelingual child of one or two years would know. A profoundly deaf person can effectively communicate with no one when he leaves the presence of one trained in sign language.

Even though Sherry Grace has an above normal intelligence, by the age of six she had learned very little. Her parents had not taken any training in sign language and the Bates program did not provide the visual teaching method required.

When Sherry was six years old, she and her parents moved to Little Rock, Arkansas, so that Sherry could attend the Arkansas School for the Deaf as a day student. The Deaf School accepts only profoundly deaf students and its programs are designed for those persons who can only receive information visually. The School for the Deaf teaches the total communication system, a method of visual communication encompassing signing, fingerspelling, visual cues, touching and mouthing. There were approximately 285 students attending the Arkansas School for the Deaf. Sherry learned some total communication skills and for the first time in her life could communicate with her teachers and her fellow students. The School also urged parents of their students to learn total communication so that they could communicate with their children. Mrs. Joann Grace attended a few classes and learned some sign language; Mr. Albert Grace did not.

Sherry Grace attended the School for the Deaf for

three years while living with her parents in Little Rock. While there, she progressed from having a language level of a two-year, two-month old child to being able to read at the 2.5 grade level. Because she was able to communicate with others and participate in the life of the school, Sherry's confidence and social ability also developed.

At the end of Sherry's third school year at the Deaf School, Mr. and Mrs. Grace decided they wanted to move from Little Rock to Springdale, Arkansas. They found Little Rock more expensive and a financial hardship even though they were self-supporting. They also wanted to be near their parents and wanted Sherry to be able to spend more time with her grandparents. When the Graces told the Deaf School of their plans to move to Springdale and to enroll Sherry in the Springdale public school system, Sherry's teachers tried to explain the necessity of keeping Sherry enrolled in the School for the Deaf, even if it involved her becoming a residential student. The school urged that removing Sherry from the Deaf School would not only hinder Sherry's academic progress, but also would isolate her from meaningful social encounters.

The Graces moved to Springdale and enrolled Sherry in the fourth grade at the Springdale Elementary School. The school tested Sherry, and after consultation with her parents, formulated an individual educational plan (IEP).

The IEP developed by the Springdale school noted that Sherry should be taught by a certified teacher of the deaf, one who employs total communication and who could teach it to Sherry. The IEP also reflected that Sherry lacked the skills in reading, spelling and arithmetic of the average fourth grader, and her general knowledge was below level. The school's IEP stated that the Arkansas School for the

Deaf in Little Rock was the proper school to meet Sherry's special needs.

The Graces disputed that Sherry should be sent to the Arkansas School for the Deaf, but otherwise agreed with the school's assessment of Sherry's needs. A temporary IEP was developed which governed Sherry's education at Springdale. Under the temporary IEP, Sherry remained in the class with nonhandicapped fourth graders, but would go to the Resource Room for approximately two hours each day to receive special instruction and speech therapy.

Because Mr. and Mrs. Grace disagreed with the original IEP developed by the Springdale school, they sought review. After proper notices and pre-hearing conferences, a due process hearing was held on November 7, 1979. The hearing officer held that the Springdale School District was wrong and that the Arkansas School for the Deaf was not the most appropriate placement for Sherry. The Springdale School District appealed and the appeals officer affirmed, holding that Sherry Grace should be educated within northwest Arkansas so that she could live with her parents.

In January, 1980, the school began to provide a full-time interpreter for the deaf who was present with Sherry in her classroom, interpreting the teacher's words and Sherry's responses.

In February, 1980, the Springdale school initiated this action seeking review of the appeals officer's decision that Sherry not be sent to the Arkansas School for the Deaf.

The case was advanced on the docket and evidence was tendered to the Court on May 8 and 9, 1980. A transcript of the due process hearing and other administrative matters was filed in this cause.

The Education for All Handicapped Children Act, 20 U.S.C. §§1401-1461, establishes a program of financial assistance to States who have demonstrated to the Commissioner of Education that they have a policy, a plan and procedures guaranteeing each handicapped child within the state a "free appropriate public education." 20 U.S.C. §1412. Arkansas has received grants under the Act and has made a certain percentage available to the local school districts as required by 20 U.S.C. §1411(b).

To assure that each school district provides a free appropriate education for handicapped children, the state must assure the local educational agency identifies and evaluates each handicapped child within its jurisdiction, formulates and implements an individualized education program (hereafter IEP) designed to meet the needs of the handicapped child. 20 U.S.C. §§1413 and 1414.

20 U.S.C. §1415 requires that parents of handicapped children be allowed to examine and discuss their child's IEP and supporting documents with the school; that parents may obtain review of IEP in an impartial due process hearing before a representative from the state educational agency; and that any party aggrieved by the findings or decision made during the state administrative proceedings can seek review in a United States District Court.

The Act requires the school to provide Sherry Grace with a free appropriate education. The Act, 20 U.S.C. §1412(5), also requires that:

> [T]o the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are

> educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The Act, 20 U.S.C. §1401(18) defines "free appropriate public education" as follows:

> [S]pecial education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5) [20 USCS §1414(a)(5)].

The Act also requires that an IEP be developed each year for the child. 20 U.S.C. §1414(a)(5).

Arkansas has chosen to participate in the Education for Handicapped Children Program. It and each local educational agency within Arkansas, including the Springdale School District, is therefore bound to comply with its provisions.

Arkansas has also enacted legislation guaranteeing education for exceptional children. Ark. Stat. Ann. §§80-2102 — 2143. The Arkansas Act is not relevant to the case before the Court, as our jurisdiction is limited by 20

U.S.C. §1415 to review for compliance with the Education for All Handicapped Children Act, 20 U.S.C. §§1401-1461.

The regulations promulgated under the Education for All Handicapped Children Act provide in part as follows:

> As used in this part, the term "free appropriate public education" means special education and related services which:
>
> (a) Are provided at public expense, under public supervision and direction, and without charge.
>
> (b) Meet the standards of the State educational agency, including the requirements of this part.
>
> (c) Include preschool, elementary school, or secondary school education in the State involved, and
>
> (d) Are provided in conformity with an individualized education program which meets the requirements under §§121a.340-121a.349 of Subpart C.

45 C.F.R. §121a.4 (1979).

> (a) As used in this part, the term "handicapped children" means those children evaluated in accordance with §§121a.530-121a.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who be-

cause of those impairments need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

45 C.F.R. §121a.5 (1979).

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

45 C.F.R. §121a.346 (1979).

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

45 C.F.R. §121a.513.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§121a.550-121a.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicapped is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

45 C.F.R. §121a.550.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under §121a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

45 C.F.R. §121a.551.

Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually;

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under §121a.551 are available to the extent

necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

Our standard for review is set out in the Act, 20 U.S.C. §1415(e), which provides as follows:

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in

> controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

We find that the Springdale School District proved by a preponderance of the evidence that the Arkansas School for the Deaf would provide the *best free education* for Sherry Grace.

At this stage of Sherry's life, the most important thing which she can learn is a language, a means to obtain knowledge. The Court observed several profoundly deaf persons who testified or attended the hearing. The Court noted the skill of the interpreters when translating for the extremely articulate Dr. Garretson and when translating for the less articulate. The Court observed the difficulty Sherry Grace had in comprehending the most simple of questions translated to her and her almost total reliance on gesture in lieu of language in answering.

The IEP developed by the Springdale School recites that Sherry's reading level is that of second grade, as are her skills in arithmetic. It is crucial that she learn a language so that she may be taught how to read and all the other basic skills.

The Arkansas School for the Deaf employs only those teachers who are skilled in Total Communication. Their cumulative experience and expertise would exceed that of the single certified teacher employed by the Springdale school system. The presence of many teachers would give

Sherry the benefit of each teacher's explanation and approach, whereas she would receive instruction from only one certified teacher of the deaf at Springdale. It is foreseeable that the certified teacher employed by Springdale to teach Sherry would teach her for more than one year, whereas at the Deaf School, Sherry would have many teachers skilled in Total Communication each year and new ones each year.

The Arkansas School for the Deaf would also provide Sherry with role models, as the evidence established that many of the teachers, grounds keepers, cooks and aides are themselves profoundly deaf, whereas there are no profoundly deaf persons associated with the Springdale school. Both Springdale and the Arkansas School for the Deaf would attempt to have profoundly deaf persons make special appearances at school, but the visits would be more frequent at the School for the Deaf.

The Arkansas School for the Deaf would also provide Sherry the opportunity to have conversations with adults as all teachers, dormitory housemothers, and most other employees have Total Communication training. If Sherry were to remain at the Springdale school, her certified teacher for the deaf would be the only adult skilled in signing or Total Communication with whom she would have regular contact. The contact with signing adults is important not only to increase her "vocabulary" of signs, but also to increase her general knowledge, an area in which she is particularly deficient as shown by the IEP.

The Arkansas School for the Deaf would surround Sherry with adults and children who sign to each other, whereas Sherry and her certified teacher would be the only ones who knew the "language" at the Springdale school.

The omnipresence of signing at the Deaf School cannot be underrated in determining the speed and skill with which Sherry could learn to effectively comprehend others and express herself.

The Arkansas School for the Deaf also has much better facilities for teaching the profoundly deaf. All television sets and movies are equipped with decoders which display the words being spoken. Such tools would greatly help Sherry's reading skills.

The Arkansas School for the Deaf also would provide Sherry a set of friends with whom she could communicate and thereby practice her signing skills during and after school hours. In contrast, the Springdale school contains no children other than Sherry who have signing or Total Communication skills. There likewise are no deaf children in the Springdale, Washington County, area near Sherry's age. (Profound deafness is a low-incidence handicap.) There are no adults skilled in signing or Total Communication who regularly visit the Grace home.

At the Deaf School, Sherry could fully participate in after-school activities such as the Girl Scouts. At Springdale, her attendance at Girl Scouts would hardly constitute participation since there would be no one to interpret for her and at this stage, it is doubtful if she could understand the signs used by an interpreter. The same is true with respect to birthday parties, or other children's activities.

The Education for All Handicapped Children Act does not require a State, through its local educational district, to provide each handicapped child with the *best* education for him; it requires a *free, appropriate education*. P.L. 94-142 §3(c), 20 U.S.C. §1401 note.

In *Rowley v. Board of Ed. of Hendrick Hudson Central School Dist.*, 483 F. Supp. 528 (S.D. N.Y. 1980), the Court addressed the meaning of "appropriate education" as follows:

> An "appropriate education" could mean an "adequate" education — that is, an education substantial enough to facilitate a child's progress from one grade to another and to enable him or her to earn a high school diploma. An "appropriate education" could also mean one which enables the handicapped child to achieve his or her full potential. Between those two extremes, however, is a standard which I conclude is more in keeping with the regulations, with the Equal Protection decisions which motivated the passage of the Act, and with common sense. This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children.

We follow the definition contained in *Rowley* and examine whether the IEP as modified after the administrative hearing which calls for Sherry to be placed in the Springdale school would provide Sherry Grace with an opportunity to achieve her full potential commensurate with the opportunity provided to nonhandicapped children.

The nonhandicapped child in the Springdale school elementary system is provided the opportunity to learn language skills, reading, writing, arithmetic, social studies and science. The school provides the nonhandicapped child an opportunity to learn the basics and to learn them well enough that he might excel in his secondary school courses.

But the Springdale school does not turn every one of its students into academicians or professionals, or even successful secondary school students. The home life of the child, his parents' interests and the child's cultural and sociological environment often determine the child's academic success and attainment or lack of such.

When we compare what Springdale School delivers to its nonhandicapped students with what it must provide to Sherry Grace under the terms of the IEP, we find, by a preponderance of the evidence, that Sherry Grace can receive an "appropriate" education while enrolled at the Springdale school.

The IEP developed for the 1979-80 school term calls for Sherry receiving instruction from a certified teacher for the deaf in manual communication, lipreading, writing and speaking. Sherry will also receive instruction in reading, arithmetic, spelling, the telling of time, handwriting, health, social sciences and art by the certified teacher. Although it is likely that Sherry could learn much more quickly at the Arkansas School for the Deaf, we note that both the Arkansas School for the Deaf and the Springdale school would be teaching the same subjects to her through certified teachers for the deaf.

The defendants introduced the testimony of teachers of the deaf who have taught students similar to Sherry in other schools in a single-teacher, single-student environment. Their testimony reveals that it is possible to teach the profoundly deaf under such circumstances and have them perform at levels comparable to the nonhandicapped. The plaintiff has not evinced one fact about Sherry which indicates that she cannot receive an appropriate education at the Springdale school, although plaintiff thoroughly

proved that the Arkansas School for the Deaf was preferable.

The plaintiff proved that Sherry had made little progress during the 1979-80 term while enrolled in Springdale. During the 1979-80 term, Sherry did not have the benefits of a certified teacher of the deaf who instructed her for the great part of the school day in Total Communication and the substantive academic subjects. Only for the second semester did Sherry have the benefit of the interpreter in class with her. Her lack of progress during the 1979-80 term is not indicative of whether Sherry can receive an appropriate education at the Springdale school in accord with her individual requirements as set out in the IEP.

Having determined that Sherry can receive an appropriate free education at both the Springdale school and the Arkansas School for the Deaf, we address the issue of "mainstreaming." 20 U.S.C. §1412(5)(B) requires that "to the maximum extent" possible, without sacrificing the child's right to an appropriate education, the handicapped must be educated with the nonhandicapped. Plaintiff urges that at Springdale Sherry would be separated for the great part of each school day not only from nonhandicapped children, but also from all other children, as she will be required to spend so much time alone with the certified teacher of the deaf. Plaintiff urges that this is more "restrictive," as that term is used in 45 C.F.R. §121a.550, than placing Sherry at the School for the Deaf.

The statute is clear. It calls for a child to be educated with nonhandicapped children to the extent consistent with the child's receiving an appropriate education. At the Springdale school, Sherry would be at recess with non-

handicapped children and would be with them for physical education, library and possibly for penmanship, science, health, social studies, music or art. At the School for the Deaf, her contacts with nonhandicapped students would not be in the regular course of the school day. Since the Springdale school can provide her an appropriate education and also meets the mainstreaming requirements of 20 U.S.C. §§1412(5)(B) and 1414(a)(1)(C)(iv), we hold that the Arkansas Department of Education's modification of the IEP was correct.

The defendants, Albert Grace, Joann Grace and Sherry Grace, have counterclaimed against the Springdale School seeking a preliminary injunction requiring the Springdale School to hire a certified teacher of the deaf, otherwise to implement the IEP developed for Sherry and to provide a summer program to remedy the deficiencies incurred during the 1979-80 school term. In their answer, the Graces also claim attorneys' fees under 31 U.S.C. §1244(e), which provides as follows:

> (e) In any action under this section to enforce section 1242(a) of this title, the court in its discretion, may allow to the prevailing party, other than the United States, reasonable attorney fees, and the United States shall be liable for fees and costs the same as a private person.

20 U.S.C. §1242(a) provides as follows:

> (a)(1) In general. — No person in the United States shall, on the ground of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity of a

State government or unit of local government, which government or unit receives funds made available under subchapter I of this chapter. Any prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975 or with respect to an otherwise qualified handicapped individual as provided in section 794 of Title 29 shall also apply to any such program or activity. Any prohibition against discrimination on the basis of religion, or any exemption from such prohibition, as provided in the Civil Rights Act of 1964 or Title VIII of the Act of April 11, 1968, hereafter referred to as Civil Rights Act of 1968, shall also apply to any such program or activity.

(2) Exceptions. —

(A) Funding. — The provisions of paragraph (1) of this subsection shall not apply where any State government or unit of local government demonstrates, by clear and convincing evidence, that the program or activity with respect to which the allegation of discrimination has been made is not funded in whole or in part with funds made available under subchapter I of this chapter.

(B) Construction projects in progress. — The provisions of paragraph (1), relating to discrimination on the basis of handicapped status, shall not apply with respect to construction projects commenced prior to January 1, 1977.

The counterclaim for attorneys' fees must be denied as

there is no statutory basis for it, 31 U.S.C. §1244(e) being inapplicable.

To the extent the counterclaim seeks an injunction requiring the Springdale School to provide Sherry with the certified teacher of the deaf and the other educational needs outlined in the IEP, the injunction should issue, even though it will apply to the 1980-81 school term only. *Rowley (Rowley II) v. Board of Education*, 483 F. Supp. 536 (S.D. N.Y. 1980).

The Graces also seek an injunction requiring the Springdale School to provide a summer program to remedy the educational deficiencies Sherry incurred during the 1979-80 school term.

The Court declines to issue an injunction requiring the Springdale School to provide a summer school program for Sherry Grace. It would take time for the Springdale School to implement such a program and given the short time remaining before the 1980-81 fall term begins, no injunction should issue.

The Springdale School asked this Court to hold that the Arkansas School for the Deaf is the most appropriate placement for Sherry Grace. Since Sherry Grace is a minor whose parents reside in Springdale, Arkansas, approximately 170 miles from the Arkansas School for the Deaf, the Court raised the issue of its authority to take action which would remove effectively the child from her parents' home. Having decided that Sherry should remain at the Springdale School for the 1980-81 school term, we need not and do not address that issue.

We point out that after Sherry has attended the Spring-

dale School for one school year, she should be re-evaluated and proper steps taken to comply with the existing law.

We also note that, upon reflection, Sherry's parents may be more desirous that their child receive the *best* instead of a mere "appropriate" scholastic exposure.

A separate judgment will be prepared in accord with this opinion. Each party will bear his or its own costs.

This 23rd day of July, 1980.

/s/ Paul X. Williams,
United States District Judge

APPENDIX "C"

REVIEW DECISION
ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION SECTION
(APPEAL)

APPELLANT: Springdale School District; Thurman Smith, Superintendent, 202 West Emma Avenue, Springdale, AR 72764

REPRESENTED BY: James M. Roy, Jr., Attorney at Law, P.O. Box 869, Springdale, AR 72764.

APPELLEE: Mr. and Mrs. Albert Grace on behalf of Sherry Grace, 1507-A White Road, Springdale, AR 72764.

REPRESENTED BY: John M. Bilheimer, Attorney at Law, 955 Tower Building, Little Rock, AR 72201.

REVIEW PERIOD: December 27, 1979 - February 4, 1980.

REVIEW HEARING: January 24, 1980 — 3:10 p.m. - 4:16 p.m., Transportation Commission Hearing Room, Arkansas Justice Building, State Capitol Grounds, Little Rock, AR 72201.

REVIEWING OFFICIAL: Larry L. Rogers, Coordinator, Arkansas Department of Education Special Education Section Instructional Division, Arch Ford Education Building, Little Rock, AR 72201.

RELEASE OF REPORT: February 4, 1980.

BACKGROUND

A due process hearing was conducted on November 7 and 8, 1979, by Dr. LaDelle Olion, an impartial hearing

officer, appointed and trained in accordance with state and federal laws and regulations. The hearing involved the educational placement of a 10 year old profoundly hearing impaired child who lives with her parents in the Springdale School District. All parties had agreed on the remainder of the content of the written Individual Education Plan (IEP).

The Petitioner (appellee in the appeal review) in the due process hearing took the position that the "least restrictive environment", as established in federal and state law, should be interpreted to mean an educational program for the child located in such proximity to the home as to allow the child to live at home with her parents.

The Respondent (appellant in the appeal review) contended that the appropriate educational program for the child, as contained in the IEP, could only be provided at the Arkansas School for the Deaf. The child had attended the Arkansas School for the Deaf for the previous three (3) years (76-77, 77-78, 78-79) after almost two years (74-75, 75-76) in an oral based educational program located in the Fayetteville Public Schools. The Respondent further contended that the lack of progress for the child in the local, oral based program and the satisfactory progress for the child while at the Arkansas School for the Deaf was strong evidence that the appropriate education in the "least restrictive environment" could only be achieved at the Arkansas School for the Deaf.

Dr. LaDelle Olion, Impartial Hearing Officer for the case in question, in a Hearing Decision dated November 27, 1979, found essentially in favor of the Petitioner. In the decision, the hearing officer wrote that . . . "the Petitioner has presented persuasive evidence that the child should

remain in the home and that a total communication program can be provided for the child within the Springdale Public Schools." Later in the decision, the hearing officer wrote, . . . "based upon relevant evidence and testimony presented, it is the Hearing Officer's Decision that the child not be placed in the Arkansas School for the Deaf." The hearing officer further cited Sections 121a.1 and 121a.55C of the regulations under P.L. 94-142. Although the decision clearly favored the position of the Petitioner, action required by the Hearing Decision was not clear.

The Respondent appealed the decision of the Impartial Hearing Officer in a certified letter dated December 26, 1979, and received by the appropriate official on December 27, 1979.

REVIEW ACTIVITIES

Review activities conducted by the reviewing official between December 27, 1979, and February 4, 1980, were as follows:

1. Reviewed transcript of the due process hearing including all exhibits.
2. Reviewed decision of hearing officer.
3. Made inquiries of officials of the Arkansas School for the Deaf and reviewed facilities and program pertinent to the case.
4. Reviewed records for litigation and due process activities in other states on similar issues.
5. Made telephone inquiries in two other states, Nebraska and Virginia, where publications suggested that similar issues had arisen.

6. Visited and reviewed an education program for hearing impaired operated by the Hot Springs School District.
7. Conducted appeal review hearing to allow parties to offer oral argument and additional evidence.

Appeal Review Hearing: The Appellant contended that the Hearing Officer's Decision was in error because it was not supported by the greater portion of the evidence offered at the hearing. Appellant alleged that local programming for the child would be detrimental because of social isolation and a lack of communication with others in the school, home, and community. Appellant cited evidence from the hearing that supported the position that acceptable educational and social development for the child could only be achieved at the School for the Deaf.

Appellee restated the original position that the requirement for an appropriate education in the "least restrictive environment" should be interpreted to require that an appropriate educational program is provided in reasonable proximity to the child's natural home. Appellee cited state education agency and local education agency responsibilities under P.L. 94-142 to assure appropriate education in the "Least Restrictive Environment."

REVIEW DECISION

Based on evidence reviewed on this appeal, the finding of this reviewer is that the "free and appropriate public education" in the "least restrictive environment" is to be provided in reasonable proximity to the child's natural home.[1] If the education program is located somewhere

[1]"Reasonable proximity to the child's home" is a distance not too great for the child to be transported on a daily basis and live at home.

other than in the Springdale School District, transportation is to be provided at no cost to the parents. The teacher(s) for the child is to be appropriately qualified.

This decision does not preclude subsequent educational program modifications, consistent with state and federal regulations, if appropriate education in the lesser restrictive environment proves unsatisfactory in terms of educational progress for the child.

In addition to the regulatory references listed in the Hearing Decision, the legal and regulatory basis for this decision are Section 4 of Act 102 as amended, C.F.R. V. 42, No. 163, August 23, 1977, Sections 121a.551 paragraph (a), (b), b(1), and 121a.552 a(3).

Section 4 of Act 102 as amended is as follows:

> Section 4. "To the maximum extent practicable, handicapped children shall be educated along with children who do not have handicaps and shall attend regular classes. Impediments of learning and to the normal functioning of handicapped children in the regular school environment shall be overcome, when possible, by the provision of special aids and services rather than by separate schooling for the handicapped.
>
> Separate schooling or other removal of handicapped children from the regular educational environment, shall occur only when, and to the extent that the nature or severity of the handicap is such that education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily."

Section 121a.551, paragraphs (a), (b), and (b1) are as follows:

121a.551 — Continuum of Alternative Placements

(a) "Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under Section 121a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

Section 121a.552, (a3) is as follows:

121a.552 — Placements

Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(3) Is as close as possible to the child's home."

Evidence found in the transcript of the due process hearing suggests that the continuum of alternative placements was not considered in making the initial placement decision early in the 79-80 school year. The absence of an existing local education program using the child's mode of communication is not sufficient justification to select placement on the more restrictive end of the continuum

before providing appropriate education in a lesser restrictive environment. ("Continuum of alternative placements" cited above.)

While the Appellant's arguments against local education for the child based on the potential social and communicative isolation are compelling, experience in other locations suggests that a child with a profound hearing loss can develop socially and can communicate sufficiently with others if appropriate program and environmental modifications are made.

This decision represents the last step of administrative appeal and is considered final unless relief is obtained through civil action (CFR 45, Vol. 42, No. 163, Tuesday, August 23, 1977, paragraph 121a.511.) The Appellant, with timely support and supervision from the State Education Agency, is to proceed with due speed to provide an appropriate education for the child in accordance with these findings.

/s/Larry L. Rogers,
Reviewing Official

APPENDIX "D"

HEARING DECISION
ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION SECTION

PETITIONER

STUDENT: Sherry Grace.

PARENTS: Mr. and Mrs. Albert Grace, Jr.

ADDRESS: 1507-A White Road, Springdale, Arkansas 72764.

REPRESENTED BY: Mr. Jim Hudson, Coordinator Arkansas Developmental Disabilities Advocacy System, State Capitol, Suite 011, Little Rock, Arkansas 72201.

RESPONDENT

SCHOOL DISTRICT: Springdale School District.

SUPERINTENDENT: Mr. Thurman Smith.

ADDRESS: Springdale Public Schools, Springdale Arkansas 72764.

REPRESENTED BY: Mr. James M. Roy, Jr., Attorney at Law, P.O. Box 869, Springdale, Arkansas 72764.

HEARING

DATE OF HEARING: November 7, 1979.

START OF HEARING: November 7, 1979 — 5:05 p.m.

CONCLUSION OF HEARING: November 8, 1979 — 12:05 a.m.

PLACE OF HEARING: Springdale High School Cafeteria, Springdale, Arkansas 72764.

HEARING OFFICER: Dr. LaDelle Olion, Department of Special Education and Psychology, University of Arkansas at Pine Bluff, Pine Bluff, Arkansas 71601.

DATE OF REPORT: November 27, 1979.

ISSUE AND PURPOSE OF THE HEARING

The *petitioner* contends that the most appropriate education for the student in the least restrictive environment is at home with her family. Additionally, the *petitioner* contends that there are existing and potential resources in the Springdale community which could establish an appropriate program in the Springdale community for the student.

The *respondent* contends that the most appropriate education for the student in the least restricted environment is the Arkansas School for the Deaf.

The purpose of the hearing was to review the placement recommended for a deaf student. The school district contends the only placement available in a total communications program for the deaf student is at the Arkansas School for the Deaf.

The following documents were entered as evidence:

1. Arkansas Children's Hearing and Speech Clinic (R No. 1);
2. Case Report Springdale Public Schools (R No. 2);
3. Letter from S.P. (R No. 3);
4. Educational Examiner's Report, Springdale (R No. 4);
5. Individual Educational Plan (R No. 5);
6. Interpreter's Oath (R No. 6);

7. Interpreter's Oath (R No. 7);
8. Witnesses (R No. 8);
9. Interpreter's Oath (R No. 9);
10. Parents Ex. (P. A-C);
11. Certificate (P. D).

During the course of the hearing, the following witnesses appeared:

1. Special Education Supervisor, Springdale Public Schools;
2. Coordinator for the Regional Program for Hearing Impaired;
3. Principal of Lower School of Arkansas School for the Deaf;
4. Superintendent of the Arkansas School for the Deaf;
5. Child in Question;
6. Superintendent of Springdale Public Schools;
7. Teacher;
8. Teacher Aide;
9. Supervisor of Special Education for Fayetteville Public Schools;
10. Coordinator State Department of Education;
11. Case Worker;
12. Professor, University of Arkansas, Area of Deafness;

13. Professor, University of Arkansas, Counselor Education;
14. Child's Aunt;
15. Former Resident of Institution;
16. Parent Hard of Hearing Child;
17. Parent of Three Handicapped Children;
18. Father of Child;
19. Mother of Child.

The school system (respondent) was represented by an attorney and the parents (petitioners) were represented by the Coordinator of the Arkansas Developmental Disabilities Advocacy System.

FINDINGS OF FACT

The Supervisor of Special Education for the *respondent* contends that based upon her familiarity with the student and the Springdale School District that the only existing program that the student could receive training in, as spelled out in the I.E.P. would be at the School for the Deaf in Little Rock. She further contends that the I.E.P. indicates that a trained teacher of the deaf would be necessary to work with the student in the areas of reading, mathematics, spelling, handwriting, science, health, social studies, music and art. The Supervisor of Special Education contends that the student needs a total communication approach and socialization opportunities with other hearing impaired children, which do not currently exist in the Springdale Public Schools.

The *petitioner* contends and was supported by the

Supervisor of Special Education that if there were a total communication teacher in Springdale who worked with the student and implemented the I.E.P. in all areas that were indicated that that would be a less restrictive setting. The supervisor further contends that educational experiences not only are learned at school, but also that the family plays an important role in the total educational process; however, she contends that just because the child is removed from the home and attends a residential placement, that this does not necessarily exclude the parents totally. She contends that the parents could work as closely with teachers from Little Rock as they could from Springdale, even if the parents lived in Springdale. She further contends that parents could reinforce what was done at the School for the Deaf by letter, and telephone. The Supervisor of Special Education also contended that as far as the existing programs go that the least restricted environment for the student would be the Arkansas School for the Deaf.

The *respondent* clarified an earlier contention of the Supervisor of Special Education. The *respondent* contends that a special education deaf teacher that would only work with the student alone, would not constitute a less restrictive setting.

The *petitioner* contends that it is interesting that there is one regional program for only oral children and that there is no regional program for total communication children.

The Coordinator for the Regional Program for Hearing Impaired for the *respondent* contends that there is a need for a hearing impaired program. She contends that the student did not progress in the Bates program and that

there were places within the immediate vicinity that persons could be served through a total communication program. She contends that there are programs in Tulsa, Missouri and Springfield that have been successful. She further contends that an eclectic program cannot be designed to fit the student's needs and that if there was such a great need for a total communication program that they would have established such a program in the past.

The *petitioner* contends that the deaf student's needs can be met in the community, if the needs of oral children can also be met in the community. The *petitioner* cited the Bates program as an example of a program that was meeting the needs of oral children within the community.

The Principal of the Lower School of the Arkansas School for the Deaf for the *respondent* contends that the student should be placed at the Arkansas School for the Deaf because she was making progress at the School for the Deaf. She contends that the student would survive beautifully as a dormitory student. She further contends that the Arkansas School for the Deaf is serving the student's needs more appropriately at this time and that the School for the Deaf was the least restrictive setting. The *respondent* also contended that it would be ideal if an appropriate program at home with mother and dad at night were available for the child.

The *petitioner* contends that an appropriate placement would be in the Springdale area.

The Superintendent of the School for the Deaf for the *respondent* contends that children have a chance to develop within themselves and that they can develop leadership at the Arkansas School for the Deaf. He contends that the

student should be placed at the School for the Deaf to obtain the appropriate services.

The *petitioner* contends that hearing impaired and deaf children can be served on a regional basis. The Superintendent of the Arkansas School for the Deaf agrees with the regional concept if it is of sufficient size and scope; meaning that there has to be enough peer competition and services up and down the line. The *petitioner* contends that the hearing impaired groups need to have more alternatives in terms of placement. The Superintendent of the School for the Deaf agrees that this is the key. That "if the numbers were there, we may have other kinds of alternatives which have not been tapped."

The Superintendent of the Springdale Public Schools for the *respondent* contends that based upon the advice of persons who advise him that the services the student needs are not in the area and the School for the Deaf would be an appropriate setting for the student.

The *petitioner* contends that the school district should look at possible funding mechanisms and initiate a program in Springdale instead of sending the student to the Arkansas School for the Deaf.

Teacher, Springdale Public Schools for the *petitioner*, contends that the student is making slow progress in reading and language and some progress in spelling and languages.

The *respondent* contends that the student's progress is very slow and that the teacher's communication with the student is very, very limited.

Aide, Springdale Public Schools for the *petitioner*,

contends that the student has friends in the classroom that she plays with.

The *respondent* contends that putting the student in a separate room with the teacher alone would be detrimental to the student. The aide further contends that the Arkansas School for the Deaf is the best and only place for the student.

The Supervisor of Special Education for the Fayetteville Public Schools for the *petitioner* contends that the program at Bates is meeting the needs of the students. He further contends that total communication children, like the child in question, should have the same opportunity as any other child; however, he contends that they do not have the facilities for such a child. The Supervisor contends that a program could not be set up to meet the child in question needs. He contends that the only placement for the child at this time is at the Arkansas School for the Deaf. The Supervisor further contends that the child in question is a part of a low incidence group that cannot be programmed for in the community.

The Supervisor of Special Education for the *respondent* contends that the program at the Arkansas School for the Deaf is the most appropriate education for the child in question and that it is in the least restrictive environment. He contends that this is the case because the public schools don't have programs that can meet the child's particular needs at this time and the child has progressed down at the School for the Deaf.

The Supervisor for the State Department of Education Special Education Section for the *petitioner* contends that there needs to be a maximum of five (5) deaf children in a

self-contained unit to be eligible for full funding. He stated that the school district must have 50% of the maximum (two and a half) to receive full funding.

Professor, University of Arkansas with responsibility for teacher training in the area of deafness for the *petitioner*, contends that in consideration of existing facilities, the most appropriate referral for the student in question is the Arkansas School for the Deaf. He contends that the student is extremely restricted in the present setting in ever acquiring linguistic skills. The Professor further contends that the child could be programmed for in any school program or facility in a number of ways. He stated that it is possible for any school or any school district to serve a student like this. He went on to state that a number of very small school districts, such as Monett, Missouri, had a class for deaf children in a rural area.

The Professor contends that there are other states and communities where parents do have alternatives available to them that we do not have at this point in time. He contends that the student in question needs a trained teacher, modified curriculum and a different pacing than she is currently receiving. The Professor contends that the most ideal situation, according to professional literature for education of the deaf child, is to be in his home community with a very specialized educational program, staff, facilities and equipment; in other words, avoiding the residential placement. He contends that it would be ideal for the child to grow up in the home environment with the parents. The Professor also contends that the child could be served regionally, given the right resources because it is being done in many other places in the United States.

The *respondent* contends that at the current time, and

he is supported by the Professor, that the best place for the child in question is the Arkansas School for the Deaf.

The *petitioner* contends that according to how he understands the law that potential programs as well as existing programs must be taken into consideration in providing an appropriate education in the least restricted setting.

Professor, University of Arkansas, Department of Counselor Education for the *petitioner* contends that removing the child from the family when the parents are able to relate well to the child and they want the child to be at home, that it has a negative effect on the child. She contends that when this happens that they are not going to have a maximum kind of experience. She further contends that from the evidence that she has heard tonight that the Arkansas School for the Deaf appears to be a very fine facility; however, she would pursue every avenue possible to keep the child in the home.

The *respondent* contends that the Professor has a limited background as far as dealing with institutions and hearing impairment.

The Aunt of the child in question for the *petitioner* contends that she would keep the child with the family if the child in question was hers.

A former resident of an institution for the *petitioner* contends that he would have had a much fuller life had he been able to stay in a home setting.

A Parent from an organization of the deaf and hard of hearing for the *petitioner* contends that total communication children should not be served in an oral program;

however, he contends that they should be educated on a home level.

A Parent of a handicapped child from Little Rock for the *petitioner* contends that from her observation of the Arkansas School for the Deaf that there was not a great deal of integration going on in terms of deaf children there going out into the mainstream of society. She contends that there are many activities at the School for the Deaf but that they could do a lot more integration into the community. She contends that she would not send her child to the School for the Deaf not with the laws today.

The Father of the child in question for the *petitioner* contends that his daughter should not go to the Arkansas School for the Deaf because she needs to be with her family at home. He contends that a program can be started that can take care of his child's needs.

The *respondent* contends that the child in question progressed more at the School for the Deaf as compared to her present placement. The *respondent* contends that if the child is placed in Springdale that she will be in isolation and that there will be few children around that can sign as proficiently as children at the Arkansas School for the Deaf in Little Rock.

The Mother of the child in question for the *petitioner* contends that her daughter seems happy at the Springdale School. She states that her daughter has friends she plays with in the neighborhood. She states that she takes her child roller skating, to the movies and camping. The Mother contends that she has a right as a parent to a program of total communication for the child, just as the parents have had the right for an oral program for their children. The

Mother contends that a program for the deaf should be set up in the Springdale area. The Mother also felt that the School for the Deaf was a wonderful school.

DECISION AND RATIONALE

The evidence and testimony presented indicates that the Arkansas School for the Deaf is not the most appropriate placement for this child. The *petitioner* has presented persuasive evidence that the child should remain in the home and that a total communication program can be provided for the child within the Springdale Public Schools.

The testimony of the Supervisor of Special Education of the Springdale Public Schools supports the above decision; although the Supervisor feels that there should be more than one child to one teacher ratio in the class.

The Principal of the lower school of the Arkansas School for the Deaf's testimony further substantiates the decision in that her testimony indicates that it would be ideal if an appropriate program at home with mother and dad at night was available for the child.

The Superintendent of the Arkansas School for the Deaf's testimony also substantiates the decision in that he agrees with the regional concept of educating the child, if it is of sufficient size and scope, and peer competition and services up and down the line can be provided.

The testimony of the Professor at the University of Arkansas with teacher training in the area of the deaf was also very persuasive and supportive of the decision. He stated that the child could be programmed in any school program or facility in a number of ways. He stated that it

is possible for any school district to serve a child like this. He even gave a number of examples of school districts, large and small, that had classes for the deaf and that had programmed for this type of child. The Professor also stated that the ideal situation for the child was the home and a very specialized educational program, staff, facilities, and equipment. He further stated that residential placement should be avoided. He went on to testify that it would be ideal for the child to grow up in the home environment with the parents.

The *respondent* (school district) presented evidence that the Arkansas School for the Deaf was the most appropriate place for the child based upon the fact that it was the only place that provided an appropriate education (total communication approach) for the child at this time. The school district was supported by testimony from the Supervisor of Special Education for Springdale Public Schools, Superintendent of the Arkansas School for the Deaf, Superintendent of the Springdale Public Schools, Teacher Aide, Supervisor of Special Education for the Fayetteville Public Schools, Supervisor of Special Education of the Arkansas School for the Deaf, and the Professor, University of Arkansas with responsibility of teacher training in the area of deafness. The *respondent* also presented testimony that the School for the Deaf was the least restrictive environment.

Nonetheless, the *petitioner* presented more persuasive evidence. Additionally, the Hearing Officer's decision was based upon Public Law 94-142, section 121a.550 which states that:

> (b) Each public agency shall insure:
>
> (1) That to the maximum extent appropri-

> ate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and
>
> (2) That special classes, separate schooling or removal of handicapped children from the regular educational environment occurs only when the nature and severity of the handicap is such that education in regular classes with the use of supplementary aid and services cannot be achieved satisfactorily.

It is the Hearing Officer's interpretation that based upon Public Law 94-142, section 121a.550 and the testimony presented that the child must be educated within the regular educational environment, since the severity of the handicap is not such that education in the public schools cannot be provided satisfactorily with the use of supplementary aids and services. The Hearing Officer feels that the evidence supports the fact that the child can be educated more appropriately and that the public school is a less restrictive environment for the child in question than would be the Arkansas School for the Deaf. It should be noted the *respondent* contends that the Arkansas School for the Deaf is the most appropriate and is the least restrictive environment for the child based upon currently existing facilities and programs. The Hearing Officer's interpretation of the law differs from the *respondent* in that the Hearing Officer's interpretation is that currently available placement options and programs do not dictate the placement decision for this child.

Additionally, it should be noted that the decision of the Hearing Officer is also supported by Public Law 94-142,

section 121a.1, in that the purpose of the law is:

> (a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs.

It should also be noted for the record that the Hearing Officer visited the Arkansas School for the Deaf in order to gain additional background information before making a decision in this case.

It should also be noted for the record that the Hearing Officer received the official transcript of the case on November 20, 1979; thus, this caused a delay in the process.

Nonetheless, based upon relevant evidence and testimony presented, it is the Hearing Officer's decision that the child not be placed in the Arkansas School for the Deaf.

This decision can be appealed to the State Department of Education upon written notice to:

> Dr. Larry Rogers, Coordinator
> Arkansas Department of Education
> Special Education Section
> Room 111 West — Arch Ford Educational Building
> Little Rock, Arkansas 72201

Notice of appeal must be sent within thirty calendar days from receipt of this report. Copies of all information relative to this hearing have been retained in locked storage by the State Department of Education in accordance with the confidentiality policies and procedures prescribed by the State Board of Education.

Respectfully submitted,

/s/ LaDelle Olion, Ph.D.
Impartial Hearing Officer

APPENDIX "E"

SUBCHAPTER I — GENERAL PROVISIONS

§ 1401. Definitions

As used in this chapter —

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

(2) The term "Commissioner" means the Commissioner of Education.

(3) The term "Advisory Committee" means the National Advisory Committee on Handicapped Children.

(4) The term "construction", except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter; or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with the activities in clause (A), (B), and (C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational

services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands and the Trust Territory of the Pacific Islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or

residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which —

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principals or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Commissioner pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: *Provided, however,* That in the case of an institution offering a

two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Commissioner determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, he shall appoint an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine whether particular institutions meet such standards. For the purposes of this paragraph the Commissioner shall publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the quality of education or training offered.

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of handicapped children, or the dissemina-

tion of information derived therefrom, including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Health, Education, and Welfare.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and

includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expenditure

in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this subchapter or under title I or title VII of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this subchapter or under such titles.

(21) The term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act.

(22) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.

Pub.L. 91-230, Title VI, §602, Apr. 13, 1970, 84 Stat. 175; Pub.L. 94-142, §4(a), Nov. 29, 1975, 89 Stat. 775.

§ 1402. Bureau for education and training of handicapped; Deputy Commissioner: appointment and compensation; Associate Deputy Commissioner and other assistants to Deputy Commissioner

(a) There shall be, within the Office of Education, a bureau for the education and training of the handicapped which shall be the principal agency in the Office of Education for administering and carrying out programs and projects relating to the education and training of the handicapped, including programs and projects for the

training of teachers of the handicapped and for research in such education and training.

(b) (1) The Bureau established under subsection (a) of this section shall be headed by a Deputy Commissioner of Education who shall be appointed by the Commissioner, who shall report directly to the Commissioner, be compensated at the rate specified for, and placed in, grade 18 of the General Schedule set forth in section 5332 of Title 5.

(2) In addition to such Deputy Commissioner, there shall be placed in such Bureau five positions for persons to assist the Deputy Commissioner in carrying out his duties, including the position of Associate Deputy Commissioner, and such positions shall be placed in grade 16 of the General Schedule set forth in section 5332 of Title 5.

Pub.L. 91-230, Title VI, §603, Apr. 13, 1970, 84 Stat. 177; Pub.L. 93-380, Title VI, §612(a), Aug. 21, 1974, 88 Stat. 579.

§ 1403. National Advisory Committee on Handicapped Children

Establishment; membership

(a) The Commissioner shall establish in the Office of Education a National Advisory Committee on Handicapped Children, consisting of fifteen members, appointed by the Commissioner. At least eight of such members shall be persons affiliated with educational, training, or research programs for the handicapped.

Functions of Committee; recommendations; report to Congress; termination of Committee

(b) The Advisory Committee shall review the administration and operation of the programs authorized by

this chapter and other provisions of law administered by the Commissioner with respect to handicapped children, including their effect in improving the educational attainment of such children, and make recommendations for the improvement of such administration and operation with respect to such children. Such recommendations shall take into consideration experience gained under this and other Federal programs for handicapped children and, to the extent appropriate, experience gained under other public and private programs for handicapped children. The Advisory Committee shall from time to time make such recommendations as it may deem appropriate to the Commissioner and shall make an annual report of its findings and recommendations to the Commissioner not later than June 30 of each year. The Commissioner shall transmit each such report to the Secretary together with his comments and recommendations, and the Secretary shall transmit such report, comments, and recommendations to the Congress together with any comments or recommendations he may have with respect thereto. The Advisory Committee shall continue to exist until October 1, 1977.

§ 1404. Acquisition of equipment and construction of necessary facilities

Authorization for use of funds

(a) In the case of any program authorized by this chapter, if the Commissioner determines that such program will be improved by permitting the funds authorized for such program to be used for the acquisition of equipment and the construction of necessary facilities, he may authorize the use of such funds for such purposes.

Recovery of payments under certain conditions

(b) If within twenty years after the completion of any construction (except minor remodeling or alteration) for which funds have been paid pursuant to a grant or contract under this chapter the facility constructed ceases to be used for the purposes for which it was constructed, the United States, unless the Secretary determines that there is good cause for releasing the recipient of the funds from its obligation, shall be entitled to recover from the applicant or other owner of the facility an amount which bears the same ratio to the then value of the facility as the amount of such Federal funds bore to the cost of the portion of the facility financed with such funds. Such value shall be determined by agreement of the parties or by action brought in the United States district court for the district in which the facility is situated.

Pub.L. 91-230, Title VI, §605, Apr. 13, 1970, 84 Stat. 177.

§ 1405. Employment of handicapped individuals

The Secretary shall assure that each recipient of assistance under this chapter shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this chapter.

Pub.L. 91-230, Title VI, §606, as added Pub.L. 94-142, §6(a), Nov. 29, 1975, 89 Stat. 795.

§ 1406. Grants for removal of architectural barriers; authorization of appropriations

(a) Upon application by an State or local educational agency or intermediate educational unit the Commissioner is authorized to make grants to pay part or all of the cost

of altering existing buildings and equipment in the same manner and to the same extent as authorized by the Act approved August 12, 1968 (Public Law 90-480), relating to architectural barriers.

(b) For the purpose of carrying out the provisions of this section, there are authorized to be appropriated such sums as may be necessary.

Pub.L. 91-230, Title VI, §607, as added Pub.L. 94-142 §6(a), Nov. 29, 1975, 89 Stat. 795.

SUBCHAPTER II — ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED CHILDREN

§ 1411. Entitlements and allocations

Formula for determining maximum State entitlement

(a)(1) Except as provided in paragraph (3) and in section 1419 of this title, the maximum amount of the grant to which a State is entitled under this subchapter for any fiscal year shall be equal to —

(A) the number of handicapped children aged three to twenty-one, inclusive, in such State who are receiving special education and related services;

multiplied by —

(B)(i) 5 per centum, for the fiscal year ending September 30, 1978, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(ii) 10 per centum, for the fiscal year ending September 30, 1979, of the average per pupil expendi-

ture in public elementary and secondary schools in the United States;

(iii) 20 per centum, for the fiscal year ending September 30, 1980, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iv) 30 per centum, for the fiscal year ending September 30, 1981, of the average per pupil expenditure in public elementary and secondary schools in the United States; and

(v) 40 per centum, for the fiscal year ending September 30, 1982, and for each fiscal year thereafter, of the average per pupil expenditure in public elementary and secondary schools in the United States;

except that no State shall receive an amount which is less than the amount which such State received under this subchapter for the fiscal year ending September 30, 1977.

(2) For the purpose of this subsection and subsection (b) through subsection (e) of this section, the term "State" does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(3) The number of handicapped children receiving special education and related services in any fiscal year shall be equal to number of such children receiving special education and related services on December 1, of the fiscal year preceding the fiscal year for which the determination is made.

(4) For purposes of paragraph (1)(B), the term "average per pupil expenditure", in the United States, means the aggregate current expenditures, during the

second fiscal year preceding the fiscal year for which the computation is made (or, if satisfactory data for such year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this subsection, means the fifty States and the District of Columbia), as the case may be, plus any direct expenditures by the State for operation of such agencies (without regard to the source of funds from which either of such expenditures are made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year.

(5) (A) In determining the allotment of each State under paragraph (1), the Commissioner may not count —

(i) handicapped children in such State under paragraph (1) (A) to the extent the number of such children is greater than 12 per centum of the number of all children aged five to seventeen, inclusive, in such State; and

(ii) handicapped children who are counted under section 241c-1 of this title.

(B) For purposes of subparagraph (A), the number of children aged five to seventeen, inclusive, in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

Distribution and use of grant funds by States for fiscal years ending September 30, 1979, and thereafter

(c) (1) Of the funds received under subsection (a) of this section by any State for the fiscal year ending September 30, 1979, and for each fiscal year thereafter —

(A) 25 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

(B) except as provided in paragraph (3), 75 per centum of such funds shall be distributed by such State pursuant to subsection (d) of this section to local educational agencies and intermediate educational units in such State, for use in accordance with priorities established under section 1412(3) of this title.

(2)(A) Subject to the provisions of subparagraph (B), of the funds which any State may use under paragraph (1)(A) —

(i) an amount which is equal to the greater of —

(I) 5 per centum of the total amount of funds received under this subchapter by such State; or

(II) $300,000;

may be used by such State for administrative costs related to carrying out the provisions of sections 1412 and 1413 of this title; and

(ii) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 1412 (3) of this title.

(B) The amount expended by any State from the funds available to such State under paragraph (1)(A) in any fiscal year for the provision of support services or for the provision of direct services shall be matched on a program basis by such State, from funds other than Federal funds, for the provision of support services or for the provision of direct services for the fiscal year involved.

(3) The provisions of section 1413(a)(9) of this title shall not apply with respect to amounts available for use by any State under paragraph (2).

(4)(A) No funds shall be distributed by any State under this subsection in any fiscal year to any local educational agency or intermediate educational unit in such State if —

(i) such local educational agency or intermediate educational unit is entitled, under subsection (d) of of this section, to less than $7,500 for such fiscal year; or

(ii) such local educational agency or intermediate educational unit has not submitted an application for such funds which meets the requirements of section 1414 of this title.

(B) Whenever the provisions of subparagraph (A) apply, the State involved shall use such funds to assure the provision of a free appropriate education to handicapped children residing in the area served by such local educational agency or such intermediate educational unit. The provisions of paragraph (2)(B) shall not apply to the use of such funds.

Allocation of funds within States to local educational agencies and intermediate educational units

(d) From the total amount of funds available to local educational agencies and intermediate educational units in any State under subsection (b)(1)(B) or subsection (c)(1)(B) of this section, as the case may be, each local educational agency or intermediate educational unit shall be entitled to an amount which bears the same ratio to the total amount available under subsection (b)(1)(B) or

subsection (c)(1)(B) of this section, as the case may be, as the number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in such local educational agency or intermediate educational unit bears to the aggregate number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in all local educational agencies and intermediate educational units which apply to the State educational agency involved for funds under this subchapter.

Territories and possessions

(e)(1) The jurisdictions to which this subsection applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(2) Each jurisdiction to which this subsection applies shall be entitled to a grant for the purposes set forth in section 601(c) in an amount equal to an amount determined by the Commissioner in accordance with criteria based on respective needs, except that the aggregate of the amount to which such jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 per centum of the aggregate of the amounts available to all States under this subchapter for that fiscal year. If the aggregate of the amounts, determined by the Commissioner pursuant to the preceding sentence, to be so needed for any fiscal year exceeds an amount equal to such 1 per centum limitation, the entitlement of each such jurisdiction shall be reduced proportionately until such aggregate does not exceed such 1 per centum limitation.

(3) The amount expended for administration by each jurisdiction under this subsection shall not exceed 5 per

centum of the amount allotted to such jurisdiction for any fiscal year, or $35,000, whichever is greater.

Indian reservations

(f) (1) The Commissioner is authorized to make payments to the Secretary of the Interior according to the need for such assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior. The amount of such payment for any fiscal year shall not exceed 1 per centum of the aggregate amounts available to all States under this subchapter for that fiscal year.

(2) The Secretary of the Interior may receive an allotment under this subsection only after submitting to the Commissioner an application which meets the applicable requirements of section 1414(a) of this title and which is approved by the Commissioner. The provisions of section 1416 of this title shall apply to any such application.

Reductions or increases

(g) (1) If the sums appropriated for any fiscal year for making payments to States under this subchapter are not sufficient to pay in full the total amounts which all States are entitled to receive under this subchapter for such fiscal year, the maximum amounts which all States are entitled to receive under this subchapter for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

(2) In the case of any fiscal year in which the maximum amounts for which States are eligible have been reduced under the first sentence of paragraph (1), and in which additional funds have not been made available to pay in full the total of such maximum amounts under the last sentence of such paragraph, the State educational agency shall fix dates before which each local educational agency or intermediate educational unit shall report to the State educational agency on the amount of funds available to the local educational agency or intermediate educational unit, under the provisions of subsection (d) of this section, which it estimates that it will expend in accordance with the provisions of this subchapter. The amounts so available to any local educational agency or intermediate educational unit, or any amount which would be available to any other local educational agency or intermediate educational unit if it were to submit a program meeting the requirements of this subchapter, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies or intermediate educational units, in the manner provided by this section, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

Pub.L. 91-230, Title VI, §611, Apr. 13, 1970, 84 Stat. 178; Pub.L. 93-380, Title VI, §614(a), (e)(1), (2), Aug. 21, 1974, 88 Stat. 580, 582; Pub.L. 94-142, §§2(a)(1)-(3), 5(a), (c), Nov. 29, 1975, 89 Stat. 773, 776, 794.

§1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that —

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handi-

cap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safe-

guards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of the subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet educational standards of the State educational agency.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned

with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

Pub.L. 91-230, Title VI, §612, Apr. 13, 1970, 84 Stat. 178; Pub.L. 92-318, Title IV, §421(b)(1)(C), June 23, 1972, 86 Stat. 341; Pub.L. 93-380, Title VI, §§614(b), (f)(1), 615(a), Title VIII, §843(b), Aug. 21, 1974, 88 Stat. 581, 582, 611; Pub.L. 94-142, §§2(a)(4), (c), (d), 5(a), Nov. 29, 1975, 89 Stat. 773, 774, 780.

§ 1413. State plans

Requisite features

(a) Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Commissioner, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall —

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412(2), and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including section 241c-1 of this title, section 844a(b)(8) of this title or its successor authority, and section 1262(a)(4)(B) of this title, under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) set forth, consistent with the purposes of this chapter, a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the inservice training of general and special educational instructional and support personnel, detailed procedures to assure that all personnel necessary to carry out the purposes of this chapter are appropriately and adequately prepared and trained, and effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects;

(4) set forth policies and procedures to assure —

(A) that, to the extent consistent with the

number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this subchapter for services to any child who is determined to be erroneously classified as eligible to be counted under section 1411(a) or 1411(d) of this title;

(6) provide satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(7) provide for (A) making such reports in such form and containing such information as the Commissioner may require to carry out his functions under this subchapter, and (B) keeping such records and affording such access thereto as the Commissioner may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this subchapter;

(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under this subchapter (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of State and local funds expended for the education of handicapped children and in no case to supplant such State and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in

part the requirement of this clause if he concurs with the evidence provided by the State;

(10) provide, consistent with procedures prescribed pursuant to section 1417(a)(2) of this title, satisfactory assurance that such fiscal control and funds accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Commissioner shall prescribe pursuant to section 1417 of this title; and

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribu-

tion of funds under this subchapter, and (C) assists the State in developing and reporting such data and evaluations as may assist the Commissioner in the performance of his responsibilities under section 1418 of this title.

Additional assurances

(b) Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

Notice and hearing prior to disapproval of plan

(c) The Commissioner shall approve any State plan and any modification thereof which —

(1) is submitted by a State eligible in accordance with section 1412 of this title; and

(2) meets the requirements of subsection (a) and subsection (b) of this section.

The Commissioner shall disapprove any State plan which does not meet the requirements of the preceding sentence, but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

Pub.L. 91-230, Title VI, §613, Apr. 13, 1970, 84 Stat. 179; Pub.L. 93-380, Title VI, §§614(c), (d), 615(b), (c), Title

VIII, §843(b)(2), Aug. 21, 1974, 88 Stat. 581, 583, 611; Pub.L. 94-142, §§2(b)(3), 5(a), Nov. 29, 1975, 89 Stat. 774, 782.

§ 1414. Application

Requisite features

(a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate educational agency. Such application shall —

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which —

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all handicapped children, including —

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that (A) the control of funds provided under this subchapter, and title to property derived from such funds, shall be in

a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property, (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter (i) shall be used to pay only the excess costs directly attributable to the education of handicapped children, and (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds, and (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this subchapter;

(3) (A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of handicapped children participating in programs carried out under this subchapter; and

(B) provide for keeping such records, and provide for affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subclause (A);

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

Approval by State educational agencies of applications submitted by local educational agencies or intermediate educational units; notice and hearing

(b)(1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that

such application meets the requirements of subsection (a) of this section, except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) of this section is approved by the Commissioner under section 1413(c) of this title. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application does not meet the requirements of subsection (a) of this section.

(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall —

(i) make no further payments to such local educational agency or such intermediate educational unit under section 1420 of this title until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a) of this section.

(B) The provisions of the last sentence of section 1416(a) of this title shall apply to any local educational

agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 1415 of this title which is adverse to the local educational agency or intermediate educational unit involved in such decision.

Consolidated applications

(c) (1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c) (4) (A) (i) of this title or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(2) (A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 1411(d) of this title if an individual application of any such local educational agency had been approved.

(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applica-

tions submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this subchapter.

(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this subchapter, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

Special education and related services provided directly by State educational agencies; regional or State centers

(d) Whenever a State educational agency determines that a local educational agency —

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency

to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

Reallocation of funds

(e) Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

Programs using State or local funds

(f) Notwithstanding the provisions of subsection (a)(2)(B)(ii) of this section, any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educa-

tional agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

Pub.L. 91-230, Title VI, §614, Apr. 13, 1970, 84 Stat. 181; Pub.L. 94-142, §5(a), Nov. 29, 1975, 89 Stat. 784.

§ 1415. Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to —

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not

known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit —

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parent's or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the

requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of

subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

Pub.L. 91-230, Title VI, §615, as added Pub.L. 94-142, §5(a), Nov. 29, 1975, 89 Stat. 788.

§ 1416. Withholding of payments; judicial review

(a) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds—

(1) that there has been a failure to comply substantially with any provision of section 1412 or section 1413 of this title, or

(2) that in the administration of the State plan there is a failure to comply with any provision of this subchapter or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan,

the Commissioner (A) shall, after notifying the State educational agency, withhold any further payments to the State under this subchapter, and (B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 1413(a)(2) of this title within his jurisdiction, to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children. If the Commissioner withholds further payments under clause (A) or clause (B) he may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this subchapter to specified local educational agencies or intermediate educational units affected by the failure. Until the Commissioner is satisfied

that there is no longer any failure to comply with the provisions of this subchapter, as specified in clause (1) or clause (2), no further payments shall be made to the State under this subchapter or under the Federal programs specified in section 1413(a)(2) of this title within his jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational agency under this subchapter shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

(b)(1) If any State is dissatisfied with the Commissioner's final action with respect to its State plan submitted under section 1413 of this title, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of Title 28.

(2) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but

the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

Pub.L. 91-230, Title VI, §616, as added Pub.L. 94-142, §5(a), Nov. 29, 1975, 89 Stat. 789.

§ 1417. Administration

Duties of Commissioner

(a)(1) In carrying out his duties under this subchapter, the Commissioner shall —

(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this subchapter;

(B) provide such short-term training programs and institutes as are necessary;

(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

(D) assure that each State shall, within one year after November 29, 1975, provide certification of the actual number of handicapped children receiving special education and related services in such State.

(2) As soon as practicable after November 29, 1975, the Commissioner shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this subchapter in order to assure equity among the States.

Rules and regulations

(b) In carrying out the provisions of this subchapter, the Commissioner (and the Secretary, in carrying out the provisions of subsection (c) of this section) shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

Protection of rights and privacy of parents and students

(c) The Secretary shall take appropriate action, in accordance with the provisions of section 1232g of this title, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Commissioner and by State and local educational agencies pursuant to the provisions of this subchapter.

Hiring of qualified personnel

(d) The Commissioner is authorized to hire qualified personnel necessary to conduct data collection and evaluation activities required by subsections (b), (c) and (d) of section 1418 of this title and to carry out his duties under subsection (a)(1) of this section without regard to the

provisions of Title 5 relating to appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates except that no more than twenty such personnel shall be employed at any time.

Pub.L. 91-230, Title VI, §617, as added Pub.L. 94-142, §5(a), Nov. 29, 1975, 89 Stat. 791.

§ 1418. Evaluation

Duty of Commissioner

(a) The Commissioner shall measure and evaluate the impact of the program authorized under this subchapter and the effectiveness of State efforts to assure the free appropriate public education of all handicapped children.

Studies and investigations

(b) The Commissioner shall conduct, directly or by grant or contract, such studies, investigations, and evaluations as are necessary to assure effective implementation of this subchapter. In carrying out his responsibilities under this section, the Commissioner shall —

(1) through the National Center for Education Statistics provide to the appropriate committees of each House of the Congress and to the general public at least annually, and shall update at least annually, programmatic information concerning programs and projects assisted under this subchapter and other Federal programs supporting the education of handicapped children, and such information from State and local educational agencies and other appropriate sources

necessary for the implementation of this subchapter, including —

(A) the number of handicapped children in each State, within each disability, who require special education and related services;

(B) the number of handicapped children in each State, within each disability, receiving a free appropriate public education and the number of handicapped children who need and are not receiving a free appropriate public education in each such State;

(C) the number of handicapped children in each State, within each disability, who are participating in regular educational programs, consistent with the requirements of section 1412(5)(B) and section 1414(a)(1)(C)(iv) of this title, and the number of handicapped children who have been placed in separate classes or separate school facilities, or who have been otherwise removed from the regular educational environment;

(D) the number of handicapped children who are enrolled in public or private institutions in each State and who are receiving a free appropriate public education, and the number of handicapped children who are in such institutions and who are not receiving a free appropriate public education;

(E) the amount of Federal, State, and local expenditures in each State specifically available for special education and related services; and

(F) the number of personnel, by disability category, employed in the education of handicapped children, and the estimated number of additional personnel needed to adequately carry out the policy established by this chapter; and

(2) provide for the evaluation of programs and projects assisted under this subchapter through —

(A) the development of effective methods and procedures for evaluation;

(B) the testing and validation of such evaluation methods and procedures; and

(C) conducting actual evaluation studies designed to test the effectiveness of such programs and projects.

Data sample

(c) In developing and furnishing information under subclause (E) of clause (1) of subsection (b) of this section, the Commissioner may base such information upon a sampling of data available from State agencies, including the State educational agencies, and local educational agencies.

Annual reports to congressional committees

(d) (1) Not later than one hundred twenty days after the close of each fiscal year, the Commissioner shall transmit to the appropriate committees of each House of the Congress a report on the progress being made toward the provision of free appropriate public education to all handicapped children, including a detailed description of all evaluation activities conducted under subsection (b) of this section.

(2) The Commissioner shall include in each such report —

(A) an analysis and evaluation of the effectiveness of procedures undertaken by each State educational agency, local educational agency, and intermediate educational unit to assure that handicapped children receive special education and related services in the least restrictive environment commensurate with their needs and to improve programs of instruction for handicapped children in day or residential facilities;

(B) any recommendations for change in the provisions of this subchapter, or any other Federal law providing support for the education of handicapped children; and

(C) an evaluation of the effectiveness of the procedures undertaken by each such agency or unit to prevent erroneous classification of children as eligible to be counted under section 1411 of this title, including actions undertaken by the Commissioner to carry out provisions of this chapter relating to such erroneous classification.

In order to carry out such analyses and evaluations, the Commissioner shall conduct a statistically valid survey for assessing the effectiveness of individualized educational programs.

Authorization of appropriations

(e) There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

Pub.L. 91-230, Title VI, §618, as added Pub.L. 94-142, §5(a), Nov. 29, 1975, 89 Stat. 791.

§ 1419. Incentive grants

Authority to make grants

(a) The Commissioner shall make a grant to any State which —

(1) has met the eligibility requirements of section 1412 of this title;

(2) has a State plan approved under section 1413 of this title; and

(3) provides special education and related services to handicapped children aged three to five, inclusive, who are counted for the purposes of section 1411(a)(1)(A) of this title.

The maximum amount of the grant for each fiscal year which a State may receive under this section shall be $300 for each such child in that State.

Application

(b) Each State which —

(1) has met the eligibility requirements of section 1412 of this title,

(2) has a State plan approved under section 1413 of this title, and

(3) desires to receive a grant under this section,

shall make an application to the Commissioner at such time, in such manner, and containing or accompanied by such information, as the Commissioner may reasonably require.

Payment

(c) The Commissioner shall pay to each State having an application approved under subsection (b) of this section the amount to which the State is entitled under this section, which amount shall be used for the purpose of providing the services specified in clause (3) of subsection (a) of this section.

Ratable reduction or increase of payments

(d) If the sums appropriated for any fiscal year for making payments to States under this section are not sufficient to pay in full the maximum amounts which all States may receive under this subchapter for such fiscal year, the maximum amounts which all States may receive under this subchapter for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

Authorization of appropriations

(e) In addition to the sums necessary to pay the entitlements under section 1411 of this title, there are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

Pub.L. 91-230, Title VI, §619, as added Pub.L. 94-142, §5(a), Nov. 29, 1975, 89 Stat. 793.

§ 1420. Payments

(a) The Commissioner shall make payments to each State in amounts which the State educational agency of

such State is eligible to receive under this subchapter. Any State educational agency receiving payments under this subsection shall distribute payments to the local educational agencies and intermediate educational units of such State in amounts which such agencies and units are eligible to receive under this subchapter after the State educational agency has approved applications of such agencies or units for payments in accordance with section 1414(b) of this title.

(b) Payments under this subchapter may be made in advance or by way of reimbursement and in such installments as the Commissioner may determine necessary.

Pub.L. 91-230, Title VI, §620, as added Pub.L. 94-142, §5(a), Nov. 29, 1975, 89 Stat. 793.

SUBCHAPTER III — CENTERS AND SERVICES TO MEET SPECIAL NEEDS OF HANDICAPPED

§ 1421. Regional resource centers

Establishment; functions

(a) The Commissioner is authorized to make grants to or contracts with institutions of higher education, State educational agencies, or combinations of such agencies or institutions, which combinations may include one or more local educational agencies, within particular regions of the United States, to pay all or part of the cost of the establishment and operation of regional centers which will develop and apply the best methods of appraising the special educational needs of handicapped children referred to them and

will provide other services to assist in meeting such needs. Centers established or operated under this section shall (1) provide testing and educational evaluation to determine the special educational needs of handicapped children referred to such centers, (2) develop educational programs to meet those needs, and (3) assist schools and other appropriate agencies, organizations, and institutions in providing such educational programs through services such as consultation (including, in appropriate cases, consultation with parents or teachers of handicapped children at such regional centers), periodic reexamination and reevaluation of special educational programs, and other technical services.

Considerations governing approval of application

(b) In determining whether to approve an application for a project under this section, the Commissioner shall consider the need for such a center in the region to be served by the applicant and the capability of the applicant to develop and apply, with the assistance of funds under this section, new methods, techniques, devices, or facilities relating to educational evaluation or education of handicapped children.

Pub.L. 91-230, Title VI, §621, April 13, 1970, 84 Stat. 181.

§ 1422. Model centers and services for deaf-blind children

Congressional declaration of purpose

(a) It is the purpose of this section to provide, through a limited number of model centers for deaf-blind children, a program designed to develop and bring to bear

upon such children, beginning as early as feasible in life, those specialized, intensive professional and allied services, methods, and aids that are found to be most effective to enable them to achieve their full potential for communication with, and adjustment to, the world around them, for useful and meaningful participation in society, and for self-fulfillment.

Authorization of Commissioner to make grants and contracts

(b) The Commissioner is authorized, upon such terms and conditions (subject to the provisions of subsection (b)(1)[1] of this section) as he deems appropriate to carry out the purposes of this section, to make grants to or contracts with public or nonprofit private agencies, organizations, or institutions to pay all or part of the cost of establishment, including construction, which for the purposes of this section shall include the construction of residential facilities, and operation of centers for deaf-blind children.

Considerations governing making of grants or contracts

(c) In determining whether to make a grant or contract under subsection (b) of this section, the Commissioner shall take into consideration the need for a center for deaf-blind children in the light of the general availability and quality of existing services for such children in the part of the country involved.

Necessary services to be provided by centers

(d)(1) A grant or contract pursuant to subsection (b) of this section shall be made only if the Commissioner

[1]So in original. Probably should read "subsection (d)(1)".

determines that there is satisfactory assurance that the center will provide such services as he has by regulation prescribed, including at least —

(A) comprehensive diagnostic and evaluative services for deaf-blind children;

(B) a program for the adjustment, orientation, and education of deaf-blind children which integrates all the professional and allied services necessary therefor; and

(C) effective consultative services for parents, teachers, and others who play a direct role in the lives of deaf-blind children to enable them to understand the special problems of such children and to assist in the process of their adjustment, orientation, and education.

(2) Any such services may be provided to deaf-blind children (and, where applicable, other persons) regardless of whether they reside in the center, may be provided at some place other than the center, and may include the provision of transportation for any such children (including an attendant) and for parents.

Pub.L. 91-230, Title VI, §622, Apr. 13, 1970, 84 Stat. 182.

§ 1423. Experimental preschool and early education programs for handicapped children

Authorization; special problems of handicapped; national distribution; urban and rural areas; scope of activities

(a) The Commissioner is authorized to arrange by contract, grant, or otherwise with appropriate public

agencies and private nonprofit organizations, for the development and carrying out by such agencies and organizations of experimental preschool and early education programs for handicapped children which the Commissioner determines show promise of promoting a comprehensive and strengthened approach to the special problems of such children. Such programs shall be distributed to the greatest extent possible throughout the Nation, and shall be carried out both in urban and in rural areas. Such programs shall include activities and services designed to (1) facilitate the intellectual, emotional, physical, mental, social, and language development of such children; (2) encourage the participation of the parents of such children in the development and operation of any such program; and (3) acquaint the community to be served by any such program with the problems and potentialities of such children.

Community coordination of programs

(b) Each arrangement for developing or carrying out a program authorized by this section shall provide for the effective coordination of each such program with similar programs in the schools of the community to be served by such a program.

Federal share; non-Federal contributions

(c) No arrangement pursuant to this section shall provide for the payment of more than 90 per centum of the cost of developing, carrying out, or evaluating such a program. Non-Federal contributions may be in cash or in kind, fairly evaluated, including, but not limited to, plant, equipment, and services.

Pub.L. 91-230, Title VI, §623, Apr. 13, 1970, 84 Stat. 183.

§ 1424. Research, innovation, training, and dissemination activities in connection with model centers and services for handicapped

Cost payments

(a) The Commissioner is authorized, either as part of any grant or contract under this subchapter, or by separate grant to, or contract with, an agency, organization, or institution operating a center or providing a service which meets such requirements as the Commissioner determines to be appropriate, consistent with the purposes of this subchapter, to pay all or part of the cost of such activities as —

(1) research to identify and meet the full range of special needs of handicapped children;

(2) development or demonstration of new, or improvements in existing, methods, approaches, or techniques, which would contribute to the adjustment and education of such children;

(3) training (either directly or otherwise) of professional and allied personnel engaged or preparing to engage in programs specifically designed for such children, including payment of stipends for trainees and allowances for travel and other expenses for them and their dependents; and

(4) dissemination of materials and information about practices found effective in working with such children.

Coordination of activities with similar activities under other parts of this chapter

(b) In making grants and contracts under this section, the Commissioner shall insure that the activities

funded under such grants and contracts will be coordinated with similar activities funded from grants and contracts under other subchapters of this chapter.

Pub.L. 91-230, Title VI, §624, Apr. 13, 1970, 84 Stat. 183.

§ 1424a. Regional education programs

Grant and contract authority; development and operation of vocational, technical, postsecondary, or adult education programs

(a) The Commissioner is authorized to make grants to or contracts with institutions of higher education, including junior and community colleges, vocational and technical institutions, and other appropriate nonprofit educational agencies for the development and operation of specially designed or modified programs of vocational, technical, postsecondary, or adult education for deaf or other handicapped persons.

Priority of programs

(b) In making grants or contracts authorized by this section the Commissioner shall give priority consideration to —

(1) programs serving multistate regions or large population centers;

(2) programs adapting existing programs of vocational, technical, postsecondary, or adult education to the special needs of handicapped persons; and

(3) programs designed to serve areas where a need for such services is clearly demonstrated.

"Handicapped persons" defined

(c) For purposes of this section, the term "handicapped persons" means persons who are mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, emotionally disturbed, crippled, or in other ways health impaired and by reason thereof require special education programming and related services.

Pub.L. 91-230,Title VI, §625, as added Pub.L. 93-380, Title VI, §616, Aug. 21, 1974, 88 Stat. 584.

§1425. Evaluations

The Commissioner shall conduct, either directly or by contract with independent organizations, a thorough and continuing evaluation of the effectiveness of each program assisted under this subchapter.

Pub.L. 91-230, Title VI, §626, formerly §625, Apr. 13, 1970, 84 Stat. 183, renumbered Pub.L. 93-380, Title VI, §616, Aug. 21, 1974, 88 Stat. 584.

§ 1426. Authorization of appropriations

There are authorized to be appropriated to carry out the provisions of section 1421 of this title, $19,000,000 for the fiscal year 1978 and for the succeeding fiscal year, $21,000,000 for fiscal year 1980, $24,000,000 for fiscal year 1981, and $25,000,000 for fiscal year 1982. There are authorized to be appropriated to carry out the provisions of section 1422 of this title, $22,000,000 for fiscal year 1978, $24,000,000 for fiscal year 1979, $26,000,000 for fiscal year 1980, $29,000,000 for fiscal year 1981, and $32,000,000 for fiscal year 1982. There are authorized to be appropriated to carry out the provisions of section 1423 of this title,

$25,000,000 for fiscal year 1978 and for each of the two succeeding fiscal years, $20,000,000 for fiscal year 1981 and for the succeeding fiscal year. There are authorized to be appropriated to carry out the provisions of section 1424a of this title, $10,000,000 for the fiscal year 1978, $12,000,000 for the fiscal year 1979, $14,000,000 for the fiscal year 1980, and $16,000,000 for the fiscal year 1981 and for the succeeding fiscal year.

Pub.L. 91-230, Title VI, §627, formerly §626, Apr. 13, 1970, 84 Stat. 184, renumbered and amended Pub.L. 93-380, Title VI, §§616, 617, Aug. 21, 1974, 88 Stat. 584, and amended Pub.L. 95-49, §2, June 17, 1977, 91 Stat. 230.

SUBCHAPTER IV — TRAINING PERSONNEL FOR EDUCATION OF HANDICAPPED

§ 1431. Grants to institutions of higher education and other appropriate institutions or agencies

The Commissioner is authorized to make grants to institutions of higher education and other appropriate nonprofit institutions or agencies to assist them —

(1) in providing training of professional personnel to conduct training of teachers and other specialists in fields related to the education of handicapped children;

(2) in providing training for personnel engaged or preparing to engage in employment as teachers of handicapped children, as supervisors of such teachers, or as speech correctionists or other special personnel providing special services for the education of such

children, or engaged or preparing to engage in research in fields related to the education of such children; and

(3) in establishing and maintaining scholarships, with such stipends and allowances as may be determined by the Commissioner, for training personnel engaged in or preparing to engage in employment as teachers of the handicapped or as related specialists.

Grants under this section may be used by such institutions to assist in covering the cost of courses of training or study for such personnel and for establishing and maintaining fellowships or traineeships with such stipends and allowances as may be determined by the Commissioner.

Pub.L. 91-230, Title VI, §631, Apr. 13, 1970, 84 Stat. 184.

§ 1432. Grants to State educational agencies for traineeships

The Commissioner is authorized to make grants to State educational agencies to assist them in establishing and maintaining, directly or through grants to institutions of higher education, programs for training personnel engaged, or preparing to engage, in employment as teachers of handicapped children or as supervisors of such teachers. Such grants shall also be available to assist such institutions in meeting the cost of training such personnel.

Pub.L. 91-230, Title VI, §632, Apr. 13, 1970, 84 Stat. 184.

§ 1433. Grants or contracts to improve recruiting of educational personnel and dissemination of information concerning educational opportunities for handicapped

The Commissioner is authorized to make grants to public or nonprofit private agencies, organizations, or

institutions, or to enter into contracts with public or private agencies, organizations, or institutions, for projects for —

(1) encouraging students and professional personnel to work in various fields of education of handicapped children and youth through, among other ways, developing and distributing imaginative or innovative materials to assist in recruiting personnel for such careers, or publicizing existing forms of financial aid which might enable students to pursue such careers, or

(2) disseminating information about the programs, services, and resources for the education of handicapped children, or providing referral services to parents, teachers, and other persons especially interested in the handicapped.

Pub.L. 91-230, Title VI, §633, Apr. 13, 1970, 84 Stat. 184.

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§ 1434. Grants for training of physical educators and recreation personnel for handicapped children

The Commissioner is authorized to make grants to institutions of higher education to assist them in providing training for personnel engaged or preparing to engage in employment as physical educators or recreation personnel for handicapped children or as educators or supervisors of such personnel, or engaged or preparing to engage in research or teaching in fields related to the physical education or recreation of such children.

Pub.L. 91-230, Title VI, §634, Apr. 13, 1970, 84 Stat. 185.

§ 1435. Reports to Commissioner

Each recipient of a grant under this subchapter during any fiscal year shall, after the end of such fiscal year, submit a report to the Commissioner. Such report shall be in such form and detail and contain such information as the Commissioner determines to be appropriate.

Pub.L. 91-230, Title VI, §635, Apr. 13, 1970, 84 Stat. 185.

§ 1436. Authorization of appropriations

There are authorized to be appropriated for carrying out the provisions of this subchapter (other than section 1433 of this title) $75,000,000 for the fiscal year 1978, $80,000,000 for the fiscal year 1979, $85,000,000 for the fiscal year 1980, $90,000,000 for the fiscal year 1981 and $95,000,000 for the fiscal year 1982. There are authorized to be appropriated to carry out the provisions of section 1433 of this title, $2,000,000 for the fiscal year 1978 and the succeeding fiscal year, and $2,500,000 for the fiscal year 1980 and each of the two succeeding years.

Pub.L. 91-230, Title VI, §636, Apr. 13, 1970, 84 Stat. 185; Pub.L. 93-380, Title VI, §618, Aug. 21, 1974, 88 Stat. 584; Pub.L. 95-49, §3, 1977, 91 Stat. 230.

SUBCHAPTER V — RESEARCH IN EDUCATION OF HANDICAPPED

§ 1441. Research, surveys, demonstration projects, and model programs relating to education of handicapped children

The Commissioner is authorized to make grants to States, State or local educational agencies, institutions of

higher education, and other public or nonprofit private educational or research agencies and organizations, and to make contracts with States, State or local eductional agencies, institutions of higher education, and other public or private educational or research agencies and organizations, for research and related purposes and to conduct research, surveys, or demonstrations, relating to education of handicapped children, including the development and conduct of model programs designed to meet the special educational needs of such children.

Pub.L. 91-230, Title VI, §641, Apr. 13, 1970, 84 Stat. 185; Pub.L. 95-49, §4, June 17, 1977, 91 Stat. 230.

§ 1442. Research and demonstration projects in physical education and recreation for handicapped children

The Commissioner is authorized to make grants to States, State or local educational agencies, institutions of higher education, and other public or nonprofit private educational or research agencies and organizations, and to make contracts with States, State or local educational agencies, institutions of higher education, and other public or private educational or research agencies and organizations, for research and related purposes relating to physical education or recreation for handicapped children, and to conduct research, surveys, or demonstrations relating to physical education or recreation for handicapped children.

Pub.L. 91-230, Title VI, §642, Apr. 13, 1970, 84 Stat. 185.

§ 1443. Panels of experts

The Commissioner shall from time to time appoint panels of experts who are competent to evaluate various

types of research or demonstration projects under this subchapter, and shall secure the advice and recommendations of one such panel before making any grant under this subchapter.

Pub.L. 91-230, Title VI, §643, Apr. 13, 1970, 84 Stat. 185.

§ 1444. Authorization of appropriations

For the purposes of carrying out this subchapter, there are authorized to be appropriated $20,000,000 for the fiscal year 1978, $22,000,000 for the fiscal year 1979. $24,000,000 for the fiscal year 1980. $26,000,000 for the fiscal year 1981, and $28,000,000 for the fiscal year 1982.

Pub.I. 91-230, Title VI, §644, Apr. 13, 1970, 84 Stat. 186; Pub.L. 93-380, Title VII, §619, Aug. 21, 1974, 88 Stat. 585; Pub.L. 95-49, §5, June 17, 1977, 91 Stat. 231.

SUBCHAPTER VI — INSTRUCTIONAL MEDIA FOR HANDICAPPED

§ 1451. Congressional statement of purposes

(a) The purposes of this subchapter are to promote —

(1) the general welfare of deaf persons by (A) bringing to such persons understanding and appreciation of those films which play such an important part in the general and cultural advancement of hearing persons, (B) providing through these films enriched educational and cultural experiences through which deaf persons can be brought into better touch with the realities of their environment, and (C) providing a

wholesome and rewarding experience which deaf persons may share together; and

(2) the educational advancement of handicapped persons by (A) carrying on research in the use of educational media for the handicapped, (B) producing and distributing educational media for the use of handicapped persons, their parents, their actual or potential employers, and other persons directly involved in work for the advancement of the handicapped, and (C) training persons in the use of educational media for the instruction of the handicapped.

Pub.L. 91-230, Title VI, §651, Apr. 13, 1970, 84 Stat. 186.

§ 1452. Captioned films and educational media for handicapped persons

Establishment of loan service

(a) The Commissioner shall establish a loan service of captioned films and educational media for the purpose of making such materials available in the United States for nonprofit purposes to handicapped persons, parents of handicapped persons, and other persons directly involved in activities for the advancement of the handicapped in accordance with regulations.

Authority of Commissioner

(b) The Commissioner is authorized to —

(1) acquire films (or rights thereto) and other educational media by purchase, lease, or gift;

(2) acquire by lease or purchased[1] equipment necessary to the administration of this subchapter;

[1]So in original. Probably should read "purchase".

(3) provide, by grant or contract, for the captioning of films;

(4) provide, by grant or contract, for the distribution of captioned films and other educational media and equipment through State schools for the handicapped and such other agencies as the Commissioner may deem appropriate to serve as local or regional centers for such distribution;

(5) provide, by grant or contract, for the conduct of research in the use of educational and training films and other educational media for the handicapped, for the production and distribution of educational and training films and other educational media for the handicapped and the training of persons in the use of such films and media, including the payment to those persons of such stipends (including allowances for travel and other expenses of such persons and their dependents) as he may determine, which shall be consistent with prevailing practices under comparably federally supported programs;

(6) utilize the facilities and services of other governmental agencies; and

(7) accept gifts, contributions, and voluntary and uncompensated services of individuals and organizations.

Pub.L. 91-230, Title VI, §652, Apr. 13, 1970, 84 Stat. 186; Pub.L. 93-380, Title VI, §620 (i), Aug. 21, 1974, 88 Stat. 585; Pub.L. 94-482, Title V, §501 (h), Oct. 12, 1976, 90 Stat. 2237.

§ 1453. Centers on educational media and materials for handicapped

Establishment and operation

(a) The Secretary is authorized to enter into agreements with institutions of higher education, State and local educational agencies, or other appropriate nonprofit agencies, for the establishment and operation of centers on educational media and materials for the handicapped, which together will provide a comprehensive program of activities to facilitate the use of new educational technology in education programs for handicapped persons, including designing, developing, and adapting instructional materials, and such other activities consistent with the purposes of this subchapter as the Secretary may prescribe in such agreements. Any such agreement shall —

(1) provide that Federal funds paid to a center will be used solely for such purposes as are set forth in the agreement; and

(2) authorize the center involved, subject to prior approval by the Secretary, to contract with public and private agencies and organizations for demonstration projects.

Preferences to qualified institutions and agencies

(b) In considering proposals to enter into agreements under this section, the Secretary shall give preference to institutions and agencies —

(1) which have demonstrated the capabilities necessary for the development and evaluation of educational media for the handicapped; and

(2) which can serve the educational technology needs of the Model High School for the Deaf (established under Public Law 89-694).

Annual report to Congress

(c) The Secretary shall make an annual report on activities carried out under this section which shall be transmitted to the Congress.

Pub.L. 91-230, Title VI, §653, Apr. 13, 1970, 84 Stat. 187; Pub.L. 94-142, §6(b), Nov. 29, 1975, 89 Stat. 795.

§ 1454. Authorization of appropriations

For the purpose of carrying out this subchapter there are authorized to be appropriated not to exceed $24,000,000 for the fiscal year 1978, $25,000,000 for the fiscal year 1979, $27,000,000 for the fiscal year 1980, $29,000,000 for the fiscal year 1981 and for each succeeding fiscal year thereafter.

Pub.L. 91-230, Title VI, §654, Apr. 13, 1970, 84 Stat. 187; Pub.L. 93-380, Title VI, §620(2), Aug. 21, 1974, 88 Stat. 585; Pub.L. 95-49, §6, June 17, 1977, 91 Stat. 231.

SUBCHAPTER VII — SPECIAL PROGRAMS FOR CHILDREN WITH SPECIFIC LEARNING DISABILITIES

§ 1461. Research, training and model centers

Authorization of Commissioner to make grants and contracts; functions of model centers; considerations governing making of contracts and grants

(a) The Commissioner is authorized to make grants to, and contracts with institutions of higher education,

State and local educational agencies, and other public and private educational and research agencies and organizations (except that no grant shall be made other than to a non-profit agency or organization) in order to carry out a program of —

(1) research and related purposes relating to the education of children with specific learning disabilities;

(2) professional or advanced training for educational personnel who are teaching, or are preparing to be teachers of, children with specific learning disabilities, or such training for persons who are, or are preparing to be, supervisors and teachers of such personnel; and

(3) establishing and operating model centers for the improvement of education of children with specific learning disabilities, which centers shall (A) provide testing and educational evaluation to identify children with learning disabilities who have been referred to such centers, (B) develop and conduct model programs designed to meet the special educational needs of such children, (C) assist appropriate educational agencies, organizations, and institutions in making such model programs available to other children with learning disabilities, and (D) disseminate new methods or techniques for overcoming learning disabilities to educational institutions, organizations, and agencies within the area served by such center and evaluate the effectiveness of the dissemination process. Such evaluation shall be conducted annually after the first year of operation of a center.

In making grants and contracts under this section the

Commissioner shall give special consideration to applications which propose innovative and creative approaches to meeting the educational needs of children with specific learning disabilities, and those which emphasize the prevention and early identification of learning disabilities.

Other considerations in making awards; geographical distribution of training programs and trained personnel; model center in each State

(b) In making grants and controls[1] under this section, the Commissioner shall —

(1) the purposes of clause (2) of subsection (a) of this section, seek to achieve an equitable geographical distribution of training programs and trained personnel throughout the Nation, and

(2) for the purposes of clause (3) of subsection (a) of this section, to the extent feasible, taking into consideration the appropriations pursuant to this section, seek to encourage the establishment of a model center in each of the States.

Authorization of appropriations

(c) For the purpose of making grants and contracts under this section there are authorized to be appropriated $10,000,000 for the fiscal year ending June 30, 1975, $20,000,000 for each of the fiscal years ending June 30, 1976, and June 30, 1977.

Pub.L. 91-230, Title VI, §661, Apr. 13, 1970, 84 Stat. 187; Pub.L. 93-380, Title VI, §621, Aug. 21, 1974, 88 Stat. 585.

[1]So in original. Probably should read "contracts".

APPENDIX "F"

§ 121.a.4. Free appropriate public education

As used in this part, the term "free appropriate public education" means special education and related services which —

(a) Are provided at public expenses, under public supervision and direction, and without charge.

(b) Meet the standards of the State educational agency, including the requirements of this part.

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under §§121a.340 — 121a.349 of Subpart C.

§ 121a.14. Special education

(a) (1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

§ 121a.120. Public participation

(a) Each annual program plan must include procedures which insure that the requirements in §§121a.280 — 121a.284 are met.

(b) Each annual program plan must also include the following:

(1) A statement describing the methods used by the State educational agency to provide notice of the public hearings on the annual program plan. The statement must include:

(i) A copy of each news release and advertisement used to provide notice,

(ii) A list of the newspapers and other media in which the State educational agency announced or published the notice, and

(iii) The dates on which the notice was announced or published.

(2) A list of the dates and locations of the public hearings on the annual program plan.

(3) A summary of comments received by the State educational agency and a description of the modifications that the State educational agency has made in the annual program plan as a result of the comments.

(4) A statement describing the methods by which the annual program plan will be made public after its approval by the Commissioner. This statement must include the information required under paragraph (b) (1) of this section.

§ 121a.121. Right to a free appropriate public education

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a

free appropriate public education within the age ranges and timelines under §121a.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State document that shows the source of the policy.

(c) The information must show that the policy —

(1) Applies to all public agencies in the State;

(2) Applies to all handicapped children;

(3) Implements the priorities established under §121a.127(a)(1) of this subpart; and

(4) Establishes timeliness for implementing the policy, in accordance with §121a.122.

§121a.360. Use of local educational agency allocation for direct services

(a) A State educational agency may not distribute funds to a local educational agency, and shall use those funds to insure the provision of free appropriate public education to handicapped children residing in the area served by the local educational agency, if the local educational agency, in any fiscal year —

(3) Is unable or unwilling to establish and maintain programs of free appropriate public education;

(4) Is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain those programs; or

(5) Has one or more handicapped children who

can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements of paragraph (a) of this section, the State educational agency may provide special education and related services directly, by contract, or through other arrangements.

§121a.361. Nature and location of services

The State educational agency may provide special education and related services under §121a.360(a) in the manner and at the location it considers appropriate. However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the least restrictive environment provisions in §§121a.550 — 121a.556 of Subpart E).

§121a.550 General

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§121a.550 — 121a.556.

(b) Each public agency shall insure —

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

§121a.551 Continuum of alternative placements

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must —

(1) Include the alternative placements listed in the definition of special education under §121a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

§121a.552 Placements

Each public agency shall insure that —

(a) Each handicapped child's educational placement:

(1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home.

(b) The various alternative placements included under §121a.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

APPENDIX "G"

§80-2118. Circumstances for separate schooling

To the maximum extent practicable, handicapped children shall be educated along with children who do not have handicaps and shall attend regular classes. Impediments of learning and to the normal functioning of handicapped children in the regular school environment shall be overcome, when possible, by the provision of special aids and services rather than by separate schooling for the handicapped.

Separate schooling or other removal of handicapped children from the regular educational environment, shall occur only when, and to the extent that the nature or severity of the handicap is such that education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily. [Acts 1973, No. 102, §4, p. 285.]

§80-2123. School districts and state responsible for free public education

The responsibility of school districts and the State to provide a free public education for handicapped children is not diminished by the availability of private schools and services. Whenever such schools and services are utilized, it continues to be the responsibility of the Department of Education to assure an appropriate quantity and quality of instructional and related services, and the protection of all other rights, and to ascertain that all handicapped children receive the educational and related services and rights to which the law of this State entitle them.

It shall be the responsibility of the school district and the State to provide the most appropriate services based on a careful evaluation of the child's needs. The provisions of this Act [§§80-2115 - 80-2139] shall provide, foremost, for the welfare and well being of the children of this State and the responsibility to provide the appropriate services is not reduced by the objection of a parent or guardian to an evaluation of the child's educational needs or to the child's participation in beneficial services designed to promote the well-being of the child, unless such objection is such that it may, itself, constitute a serious obstacle acting to the detriment of the child. [Acts 1973, No. 102, §9, p. 285; 1975, No. 641, §3, p. 1758.]

Opposition

Office - Supreme Court, U.S.
FILED
DEC 9 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-596

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

SPRINGDALE SCHOOL DISTRICT NO. 50
OF WASHINGTON COUNTY

Petitioner

VS.

SHERRY GRACE, A MINOR, AND ALBERT GRACE AND JOANN GRACE, INDIVIDUALLY AND AS PARENTS OF SHERRY GRACE

ARKANSAS STATE DEPARTMENT OF EDUCATION a/k/a DEPARTMENT OF EDUCATION, STATE BOARD OF EDUCATION; WAYNE HARTSFIELD AS CHAIRMAN OF THE STATE BOARD OF EDUCATION; MRS. JAMES W. CHESTNUTT, JIM DUPREE, T. C. COGBILL, JR., MRS. ALICE L. PRESTON, HARRY A. HAINES, DR. HARRY P. McDONALD, ROBERT L. NEWTON AND WALTER TURNBOW AS MEMBERS OF THE STATE BOARD OF EDUCATION; DON R. ROBERTS, DIRECTOR OF THE DEPARTMENT OF EDUCATION

Respondents

ON WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

1. DID THE CIRCUIT COURT ERR IN HOLDING THAT A FREE APPROPRIATE PUBLIC EDUCATION UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT CAN AND SHOULD BE PROVIDED IN THE LOCAL SCHOOL DISTRICT?

2. DID THE CIRCUIT COURT ERR IN HOLDING THAT TO EDUCATE A CHILD IN A ONE-ON-ONE EDUCATIONAL ENVIRONMENT IS A FREE APPROPRIATE PUBLIC EDUCATION AND FURTHER THAT SUCH ARRANGEMENT SATISFIES THE MAINSTREAMING REQUIREMENTS OF THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT?

3. DID THE COURT ERR IN HOLDING THAT THE ARKANSAS ACT FOR THE EDUCATION FOR ALL HANDICAPPED CHILDREN, *ARK. STAT.* §80-2114 *THROUGH* §80-2139, WAS IRRELEVANT AND COULD NOT BE CONSIDERED IN LIGHT OF THE ADOPTION OF THE FEDERAL STATUTE?

PARTIES TO THE PROCEEDINGS

The petitioner is Springdale School District No. 50 of Washington County, Arkansas [hereinafter the "local educational agency" or "LEA"].

The respondents are Sherry Grace [hereinafter "the handicapped child" or simply "the child"] and the Arkansas State Department of Education and members of the State Board of Education [hereinafter the "state educational agency" or "SEA"].

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OCTOBER TERM, 1981

SPRINGDALE SCHOOL DISTRICT NO. 50
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Respondents

ON WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 656 F.2d 300 (8th Cir. 1981) and is reproduced in the Petition for Writ of Certiorari at A-1. The Court of Appeals issued a substituted Page 9 of its opinion on October 2, 1981 and that page is reproduced in respondents' Appendix "A". The only change

between the substituted page and the original page is the omission in the substitution of the following sentence:

> "This goes against the backbone of the Act which is to keep handicapped children out of institutions where often they are no more than prisoners serving life terms."

The original Page 9 appears in the Petition for Writ of Certiorari at A-10.

The opinion of the United States District Court for the Western District of Arkansas, Honorable Paul X. Williams, District Judge presiding, is reported at 494 F. Supp. 266 (W.D. Ark. 1980) and is reproduced in the Petition for Writ of Certiorari at A-12.

JURISDICTIONAL STATEMENT

The petitioner relies on 28 U.S.C. §1254(1) as the basis for this Court's jurisdiction. Additionally, petitioner relies on Rule 17(c) of this Court governing jurisdiction on Writ of Certiorari which provides as follows:

> When a . . . federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court or has decided a federal question in a way in conflict with applicable decisions of this court.

The broad issues presented in this case will be decided by this Court in *Board of Ed. H. Hudson Central School Dist. v. Rowley*, No. 80-1002, *cert. granted* November 3, 1981 and therefore there is no longer any need for the Court to consider the present case pursuant to Rule 17(c). Further, the decision herein is not in conflict with applicable decisions of this Court.

APPLICABLE CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The petitioner has adequately set forth the applicable statutory and regulatory provisions of the Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq.* The only constitutional provision involved is the equal protection clause of the Fourteenth Amendment. Section 3(c) of P.L. 94-142 [the Education of All Handicapped Children Act] which states the purpose of the Act is set out in respondent's Appendix "B". In addition §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, is involved and is set out in respondent's Appendix "C".

STATEMENT OF THE CASE

Sherry Grace is an eleven year old deaf child. Her education began with her enrollment in a preschool program conducted by the Fayetteville Public Schools at Bates Elementary. The Bates program was established to educate hearing impaired children in an oral program. Sherry remained in the Bates half-day program for two years. When she became six years old, the officials at Bates referred her to the Arkansas School for the Deaf in Little Rock, two hundred miles southeast of her home in Springdale, Arkansas.

Because she was so young, Sherry's parents left Springdale and moved with Sherry to Little Rock where she enrolled as a day student in the lower school program of the Arkansas School for the Deaf [hereinafter called ASD]. The ASD employs a total communication method of educating hearing impaired children.

Through evaluation, it was determined that Sherry

Grace's degree of impairment was such that she requires the total communication method of education. Sherry progressed from her initial placement in the pre-school level at ASD through the second elementary level.

After their third year in Little Rock, the Grace family decided that they could not, either emotionally or financially, endure life in Little Rock any longer. When the Graces learned of their right to have Sherry educated with non-handicapped children under the Education for All Handicapped Children Act of 1975 they moved back to Springdale and petitioned the local school to provide a free and appropriate education for Sherry.

Sherry Grace was evaluated and an individualized education plan (IEP) was established for her. The IEP showed that Sherry needs a trained teacher of the deaf as well as related services of speech therapy and audiology training. It also shows her need for a total communication method of education. The school district determined that the ASD was the only place which could provide the services Sherry needed. The IEP also provides that Sherry will have PE and library with the regular fourth grade students. There are no "regular fourth grade students" at ASD, all of its students being hearing impaired.

The parents protested that the ASD was not the proper placement and that Sherry should be educated near her home in Springdale. A due process hearing was held, after which the impartial hearing officer determined that the ASD was not the proper placement for Sherry.

The school district appealed to the state level, after which the appeals officer determined that Sherry should be educated in close proximity to her home, possibly in a

regional program, to allow her to travel back and forth on a daily basis.

The school district appealed to the U. S. District Court and a two-day hearing was held on May 8-9, 1980.

Jurisdiction of the district court was invoked pursuant to 20 U.S.C. §1415(e)(2). The judgment of the district court entered on July 25, 1980 was that the decision of the Arkansas Department of Education with respect to the IEP developed for the 1979-80 school term for Sherry Grace should be affirmed. The district court ordered and enjoined the plaintiff school district to provide Sherry Grace with a certified teacher of the deaf for the 1980-81 school term.

In its memorandum opinion the district court found that the Act requires the school to provide Sherry Grace with a free appropriate education and adopted the definition of "appropriate education" developed by the district court in *Rowley v. Board of Education,* 483 F. Supp. 528 (S.D. N.Y. 1980), *aff'd* 3 EHLR 552:101 (2nd Cir. 1980), *cert. granted* 50 LW 3334 (Nov. 3, 1981), which standard "requires that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children." The court found that nonhandicapped children in Springdale schools are provided the opportunity to learn language skills, reading, writing, arithmetic, social studies and science. Sherry Grace's IEP calls for instruction from a certified teacher for the deaf in manual communication (language skills), lipreading, writing and speaking. Instruction in reading, arithmetic, spelling, telling time, handwriting, health, social sciences and art would be provided by the certified teacher.

The court concluded that Sherry can receive an appropriate education at both the Springdale School and the ASD. The court found that 20 U.S.C. §1412(5)(B) requires the child to be educated with nonhandicapped children to the extent consistent with the child's receiving an appropriate education. Since the Springdale school can provide an appropriate education and can also meet the mainstreaming requirements of the Act, the court held that the Arkansas Department of Education's modification of the IEP was correct.

The school district appealed the district court's decision to the U. S. Court of Appeals for the Eighth Circuit. On August 7, 1981, the Court of Appeals affirmed the district court's decision that Springdale School district could provide Sherry Grace with a free appropriate education. *Springdale Sch. Dist. v. Grace, et al,* 656 F.2d 300, 302 (8th Cir. 1981). By affirming the district court's adoption of the *Rowley* standard the Court of Appeals assured that its decision is in keeping with this Court's decision in *Brown v. Bd. of Ed.,* 347 U.S. 483 (1954) to guarantee equal protection in education to all children. In addition, the decision is supported by the mainstreaming requirements of the Act that to the maximum extent possible "without sacrificing the child's right to an appropriate education, the handicapped must be educated with the nonhandicapped." 656 F.2d at 305. Finally, the decision is in keeping with §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, which prohibits discrimination solely on the basis of handicap.

The decision below is in conformity with decisions of the Second and Third Circuit Courts of Appeal, the only other Circuits which have decided the issue of appropriate-

ness in handicap education. This Court has granted certiorari in *Board of Education of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* No. 80-1002, 50 LW 3334 (Nov. 3, 1981) and will consider the standard relied on by the Eighth Circuit in the present case. It is therefore unnecessary for this Court to consider the same issue in the present case.

SUMMARY OF RESPONDENTS' ARGUMENT

1. Respondents submit that the decision of the Court of Appeals for the Eighth Circuit in holding that a free appropriate education for a handicapped child can and should be provided in her home school district is in keeping with the decisions of all the other Circuit Courts of Appeals. These decisions are in keeping with previous decisions of this Court guaranteeing equal protection in education. The issue is currently pending before this Court in another case and therefore review of the present case is unnecessary.

2. The petitioner ignores that "appropriate education" means more than academic exposure. Sherry Grace's emotional and sociological needs must be considered in addition to academic exposure. The lower courts gave such consideration. Denying certiorari would affirm the thrust of EHA that mainstreaming the handicapped child in the community is of utmost importance and would deny the Petitioner the ability to institutionalize Sherry Grace and other similarly situated handicapped children.

3. The respondents have no response to the third question presented for review beyond the argument that jurisdiction is predicated on a federal act and the state law does not present a substantial federal question beyond the scope of the federal act under consideration.

REASONS FOR DENYING THE WRIT

I.

DID THE CIRCUIT COURT ERR IN HOLDING THAT A FREE APPROPRIATE PUBLIC EDUCATION UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975 CAN AND SHOULD BE PROVIDED IN THE LOCAL SCHOOL DISTRICT?

The petitioner raises three questions which it is asserted require consideration on review. The respondent initially notes that in Rule 17 of the Rules of the Supreme Court a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Rule 17(1) sets out the general, but not limited, considerations governing review of federal court of appeals decisions as follows:

> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The first question presented by the petitioner is whether the Circuit Court erred in equating a free appropriate public education to "a merely appropriate education or a merely appropriate academic exposure." The respondents have reworded the first question presented to reflect more accurately what the Circuit Court held.

The applicable standard governing whether this Court will grant the petition for review is as stated in Rule

17(1)(c) quoted above. The question of federal law decided herein is the definition of "appropriate education" for a handicapped child within the scope of the Education for All Handicapped Children Act [hereinafter "the Act"], 20 U.S.C. §1401 *et seq,* Public Law 94-142. The respondents deny that this is "an important question of federal law" which should be settled by this Court.

In reaching its definition of appropriate education, the court relied on the standard adopted by the Court of Appeals for the Second Circuit in *Board of Education H. Hudson Central School District v. Rowley,* 3 EHLR 552:101 (2nd Cir. 1980), *cert. granted,* 50 LW 3334 (Nov. 3, 1981). As adopted by the Eighth Circuit herein, "this standard would require that each handicapped child be given the opportunity to achieve his full potential commensurate with the opportunity provided to other children." *Springdale School District v. Grace,* 656 F.2d 300, 304 (8th Cir. 1981). The court identified this standard as one guaranteeing equal protection in education when it found that the *Rowley* standard "provides the handicapped child with the opportunity to achieve her full potential . . . commensurate with the opportunity granted to nonhandicapped in the same system." *Id.* at 305. This decision is in keeping with the applicable decision of this Court in *Brown v. Board of Education,* 347 U.S. 483 (1954) that in the field of public education separate educational facilities are inherently unequal. Segregating handicapped children into separate educational institutions deprives them of the equal protection of the laws guaranteed by the Fourteenth Amendment. The decision herein guarantees that Sherry Grace is not deprived of equal protection by granting her the opportunity to be educated in her home school district with her nonhandicapped peers.

The fact that this Court has granted the writ of certiorari to the Court of Appeals for the Second Circuit and will review *Rowley,* satisfies the reasons given why petitioner believes review of the present case is required. The first question presented for review in *Rowley* is whether the standard of "free appropriate public education" adopted by the Court of Appeals would cause chaos in the administration of the Education for All Handicapped Children Act. Consideration by this Court of that question encompasses the questions presented for review by the present case and precludes the necessity for duplicative review.

The petitioner contends that the *Rowley* standard is infirm for educational purposes because it was "based on an act with a totally different purpose." (Petitioner's Brief at 8). The regulation on which the district judge relied was promulgated pursuant to §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 which prohibits discrimination under federal grants and programs and provides as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities

> Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Springdale School District, petitioner herein, receives federal financial assistance pursuant to the Education for All Handicapped Children Act, one of the programs covered by §504. Any regulation promulgated pursuant to §504 is therefore relevant and applicable to the Education of Handicapped Children Act. 45 C.F.R. §84.1. Petitioner's argument that the *Rowley* standard does not apply to the Act is not only meritless, but is moot in light of this Court's review of *Rowley*.

Petitioner's second contention is that there is no definitive answer or definition as to what constitutes a free appropriate education. The Second Circuit, Third Circuit and Eighth Circuit all agree that what is appropriate for each child is determined by the Individualized Education Plan developed for that child based on his unique needs. There is no need for an inflexible definition of appropriate, there is only the need for the courts to continue to define appropriateness in this manner which is consistent with the Act.

In *Battle v. Commonwealth of Pa.*, 629 F.2d 269 (3rd Cir. 1980), *cert. denied, sub nom Scanlon v. Battle*, —— U.S. —— (June 20, 1981) the court found that "the core of the educational programming under the Act is the individualized educational program" 629 F.2d at 276 and concluded that the IEP is the statutory vehicle for formulating the educational objectives and program for each

child and by requiring attention to the child's unique needs, the Act demands that special education be tailored to the individual. *Id.* at 280. The court adopted the *Rowley* equal protection standard. *Id.* at 278.

In *Rowley v. Board of Education of H. Hudson Sch. Dist.*, 483 F. Supp. 528 (S.D. N.Y. 1980), *aff'd* 3 EHLR 552:101 (2nd Cir. 1980), *cert. granted*, 50 LW 3334 (Nov. 3, 1981) the Second Circuit affirmed the district court's finding that the Act requires that an individualized education program be developed for every handicapped child. The regulations give only guidance to courts to develop the definition of appropriate which will ensure that the child's needs are met through implementation of the IEP.

The Eighth Circuit in the present case has also adopted the *Rowley* standard. Thus, there is no conflict among the circuits, the decisions are in conformity with this Court's decisions on equal protection, and this Court will review the standard applied uniformly by the circuits when it reviews *Rowley*. For all of these reasons, the Petition for Writ of Certiorari should be denied.

II.

DID THE CIRCUIT COURT ERR IN HOLDING THAT TO EDUCATE A CHILD IN A ONE-ON-ONE EDUCATIONAL ENVIRONMENT IS A FREE APPROPRIATE PUBLIC EDUCATION AND FURTHER THAT SUCH ARRANGEMENT SATISFIES THE MAINSTREAMING REQUIREMENTS OF THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT?

The petitioners and respondents agree to the assessment of Sherry Grace's needs as outlined in her IEP that she needs the total communication method of instruction to be taught by a certified teacher for the deaf. The real controversy arises in the discussion of placement in fulfilling the requirements of the individualized education plan. What is overlooked by the petitioners in their arguments in the lower court and in this Court is that academic considerations are not the sole considerations to be made in the placement of a child in the correct educational environment. The choices that have been made available throughout this litigation are for Sherry Grace to be educated at the Arkansas School for the Deaf, 160 miles from her home in a residential institution versus being placed in a program at the Springdale School where she otherwise would be educated notwithstanding her handicap. All parties agree and the courts have held that Sherry Grace would be educated by a trained certified teacher for the deaf in whatever educational environment she were placed. (A-9, A-28)

The courts also noted that it is an improper comparison to say that Sherry Grace has not progressed while attending the Springdale School since her initial placement did

not include a certified teacher for the deaf as required in her IEP. (A-4, A-29)

The trilogy of concepts that holds the Education For All Handicapped Children Act together include (1) that it is assumed a continuum of placement are available to meet each handicapped child's need for special education, (2) that mainstreaming will occur in the least restrictive environment, and (3) that the educational placement would be as close as possible to the child's home. All three concepts need to be considered together not to the exclusion of any. The most significant concept of the three for Sherry Grace involves her sociological and emotional needs in being with her family. Both lower courts recognize the crucial need and refused to ignore such an important need in the development of the proper placement for Sherry Grace in the fulfillment of her educational needs.

Judge Williams in the District Court opinion puts it as follows: "But the Springdale School does not turn everyone of its students into academicians or professionals, or even successful secondary school students. The home life of the child, his parents' interest and the child's cultural and sociological environment often determine the child's academic success and attainment or lack of such." (A-28)

The Appellate Court stated it as follows: "The fact that Sherry may not, like many nonhandicapped children, reach her full potential is not due to any err in the District Court's interpretation of the Act or its finding that the Springdale School could appropriately educate Sherry, but instead may well result in the forces outside the school environment. The Act cannot remedy a child's cultural or sociological environment nor force parents, by threatening to remove the child from the home to become partners with

the State in insuring that a child reach her full potential." (A-9)

The Appellate Court goes on to say: "At the School for the Deaf, however, Sherry would have virtually no contact with nonhandicapped children. This goes against the backbone of the Act which is to keep handicapped children out of institutions where they often are no more than prisoners serving life terms." (A-10)

It is therefore the position of the respondents that the petitioners totally ignore the crucial facts that the District Court and Appellate Court refused to ignore; that is, there is more to defining "an appropriate education" than just determining where the best academic exposure can be. There are numerous trade-offs in life. Sherry Grace and her family are no exception. It is the Grace family's position, well supported in the testimony before the District Court, that the only placement feasible for Sherry Grace emotionally and sociologically is at the Springdale School where she can be with her mother, father, and family. The family and Sherry strongly oppose being institutionalized at the Arkansas School for the Deaf as a residential student.

The School District therefore must insure that a continuum of alternative placements is available pursuant to 45 C.F.R. §121a.550. Since this can be done at the Springdale School, the School District must insure that the educational placement is as close as possible to Sherry Grace's home. 45 C.F.R. §121a.552(a)(3). The School District is obligated by regulation to give consideration to any potential harmful effect on the child in selecting the least restrictive environment. 45 C.F.R. §121a.552(d). The respondents submit that the School District refuses to

consider the harmful effects that a residential school would have on Sherry Grace. (A-22)

The petitioners submit that this Court should grant certiorari to set down a definitive statement of what "a free appropriate public education" means under the Education For All Handicapped Children Act. The petitioners cite several cases in various jurisdictions that define free appropriate education in different ways. In the words of Judge Nichols, "The results are far short of uniform. They run a broad spectrum". (A-7) An analysis of the cases will quickly show this Court that a definitive statement on what a "free appropriate public education" is will serve no useful purpose. Indeed, the nature of the Education For All Handicapped Children Act is to be flexible enough in establishing what an appropriate education is for each child on a case by case basis. It is conceded by the respondents that the outcome of this case could be different given Sherry Grace being in a different state with different facilities available to her.

The respondents submit that the development of the case law pursuant to the Education For All Handicapped Children Act is being developed sufficiently by the Circuit Courts of Appeal and no guidance is necessary by this Court for the purpose of defining what an appropriate education means for all handicapped students.

To prevent the Court from stating a rigid definition of appropriate education we request this Court to deny certiorari.

III.

DID THE COURT ERR IN HOLDING THAT THE ARKANSAS ACT FOR THE EDUCATION OF ALL HANDICAPPED CHILDREN, *ARK. STAT.* §80-2114 *THROUGH* §80-2139, WAS IRRELEVANT AND COULD NOT BE CONSIDERED IN LIGHT OF THE ADOPTION OF THE FEDERAL STATUTE?

The respondents agree with the Eighth Circuit Court of Appeals in addressing this issue. It would be extremely difficult for the Federal Courts to be consistent in their opinions notwithstanding the difficulty they have at the present time in trying to determine on a case by case basis what "appropriate" means without having the added problems of analyzing the various state laws that may be applicable.

Notwithstanding this specific problem, *Ark. Stat. Ann.* §80-2123, states in part: "The provisions of this Act shall provide, foremost, for the welfare and well-being of the children of this state and the responsibility to provide the appropriate services is not reduced by the objection of the parent or guardian to an evaluation of the child's educational needs or to the child's participation and beneficial services designed to promote the well being of the child, *unless such objection is such that it may, itself, constitute a serious obstacle acting to the detriment of the child.*" The respondents therefore submit that even if the Arkansas law were to apply the objections of the parents in having Sherry Grace institutionalized at the Arkansas School for the Deaf should be considered. Institutionalization would constitute a serious obstacle acting to the detriment of the child that needed to be considered and

certainly was considered by the District Court and the Eighth Circuit Court of Appeals.

Respondents submit this issue is moot as it applies to this case.

CONCLUSION

The Education For All Handicapped Children Act does not require a uniform definition of "appropriate education". The Act requires that an individualized education plan (IEP) be developed for each child based on his unique needs. Appropriate education has been defined in terms consistent with the provisions of educational services required by the child's IEP. The Act does not need a rigid definition of appropriate education, therefore review by this Court is unnecessary.

The equal protection standard used by the Eighth Circuit Court of Appeals herein to define appropriate education is in keeping with this Court's decisions concerning equal protection in education. There is no conflict among the circuits applying the equal protection standard. Therefore, review by this Court is unnecessary.

Respectfully submitted,

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APPENDICES

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U.S. COURT & CUSTOM HOUSE
1114 MARKET STREET
ST. LOUIS, MISSOURI 63101

October 2, 1981

Mr. James M. Roy, Jr.
Mr. Stephen M. Sharum
Ms. Nelwyn Davis
Mr. Seymour DuBow
Hon. Paul X. Williams, Chief Judge
Mr. Pat L. Graham, Jr., Clerk
Ms. Sheryl Dicker
West Publishing Co.
Commerce Clearing House
National Center for Automated Information Retrieval
Prentice Hall, Inc.
Bureau of National Affairs

Re: 80-1777 Springdale School Dist., etc. v. Sherry Grace, etc., et al

Dear Sirs:

Enclosed herewith please find copy of an order entered by us today at the direction of the Court.

Sincerely,

/s/ Robert D. St. Vrain
Clerk of Court

lkl

cc: Hon. Gerald W. Heaney
Hon. J. Smith Henley
Hon. Fred J. Nichol, Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1981

No. 80-1777

SPRINGDALE SCHOOL DISTRICT No. 50 OF WASHINGTON COUNTY ..... *Appellant*

VS.

SHERRY GRACE, ETC., ET AL ..... *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

On the Court's own motion it is now here ordered that the opinion previously filed on August 7, 1981 be, and it is hereby, amended by the substitution of the attached page 9.

October 2, 1981

[The original page 9 begins on A-9 through A-10 in the Petition for Writ of Certiorari.]

of the Act require that "to the maximum extent" possible, without sacrificing the child's right to an appropriate education, the handicapped must be educated with the non-handicapped. The regulations required that the handicapped child not only be educated as close to home as possible, but also that when possible the child should be educated in the school which he or she would attend if not handicapped.[8]

---

[8] 45 C.F.R. section 121a.513(b) provides that

Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, . . . are educated with children who are not handicapped. . . .

(Continued on page A-3)

At the Springdale School Sherry would be with nonhandicapped children for physical education, library, and possibly penmanship, science, health, social studies, music and art. At the School for the Deaf, however, Sherry would have virtually no contact with nonhandicapped children. Although Sherry's case does appear

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45 C.F.R. section 121a.551 provides assurance that

(a) Each handicapped child's educational placement:

(1) Is determined at least annually;

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home; . . .

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped. . . .

The only exception to the above requirements is "when the nature of or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. section 1412(5)(B); 45 C.F.R. section 121a.513(b)(2). Since we hold that Sherry can, with the use of supplemental services, receive an appropriate education at the Springdale School the above exception would be inapplicable.

APPENDIX "B"

HISTORICAL NOTE TO 20 U.S.C. §1401

Short Title; Congressional Findings; Congressional Declaration of Purpose. P.L. 91-230, §601, as amended by P.L. 94-142, §3(a), provided that:

* * *

"(c) It is the purpose of this Act [this chapter] to assure that all handicapped children have available to them, within the time periods specified in section 612(2)(B) [section 1412(2)(B) of this title], a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children."

APPENDIX "C"

Rehabilitation Act of 1973, §504

29 U.S.C. §794. Nondiscrimination under Federal Grants and Programs.

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Pub. L. 93-112, Title V, §504, Sept. 26, 1973, 87 Stat. 394; amended Pub. L. 95-602, Title I, §119, Nov. 9, 1978, 92 Stat. 2982.

Petitioner's Reply Brief

81-596

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NO.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

SPRINGDALE SCHOOL DISTRICT NO. 50 OF WASHINGTON COUNTY ..... Petitioner

V.

SHERRY GRACE, A MINOR, AND ALBERT GRACE AND JOANN GRACE, INDIVIDUALLY AND AS PARENTS OF SHERRY GRACE

ARKANSAS STATE DEPARTMENT OF EDUCATION a/k/a DEPARTMENT OF EDUCATION; STATE BOARD OF EDUCATION; WAYNE HARTSFIELD AS CHAIRMAN OF THE STATE BOARD OF EDUCATION; MRS. JAMES W. CHESTNUTT, JIM DUPREE, T. C. COGBILL, JR., MRS. ALICE L. PRESTON, HARRY A. HAINES, DR. HARRY P. McDONALD, ROBERT L. NEWTON AND WALTER TURNBOW AS MEMBERS OF THE STATE BOARD OF EDUCATION; DON R. ROBERTS, DIRECTOR OF THE DEPARTMENT OF EDUCATION ..... Respondents

ON WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

The principal questions presented for review are:

1. Did the Circuit Court err in equating a free appropriate public education under the Education for All Handicapped Children's Act to a merely appropriate education or a merely appropriate academic exposure?

2. Did the Circuit Court err in holding that to educate a child in a one-on-one educational environment is a free appropriate public education and further that such an arrangement satisfies the mainstreaming requirements of the Education for All Handicapped Children's Act?

3. Did the Court err in holding that the Arkansas act for the education for all handicapped children, Ark. Stat. 80-2114 through 80-2139 was irrelevant and could not be considered in light of the adoption of the federal statute?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to this proceeding before the Court of Appeals and the District Court.

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Board of Education of H. Hudson Central School District v. Rowley, 3 E.H.L.R. 552:101 (2nd Cir. 1980), *cert granted*, 50 L.W. 334 (Nov. 3, 1981) 1

STATUTES:

Regulations under Education for All Handicapped Children's Act of 1975, 45 C.F.R.

121a.551 3

121a.552 4

REASONS FOR GRANTING THIS WRIT

1.

DID THE CIRCUIT COURT ERR IN EQUATING A FREE APPROPRIATE PUBLIC EDUCATION UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN'S ACT TO A MERELY APPROPRIATE EDUCATION OR A MERELY APPROPRIATE ACADEMIC EXPOSURE?

The new arguments raised by respondent in regard to Point I of petitioner's request for certiorari in this case are that: (1) since this Court has granted cert in the case of *Board of Education of H. Hudson Central School District v. Rowley*, 3 E.H.L.R. 552:101 (2nd Cir. 1980), *cert granted* 50 L.W. 334 (Nov. 3, 1981), the issues herein need not be addressed; (2) the decision of the Court of Appeals is consistent with Section 504 of the Rehabilitation Act.

Petitioner submits that the granting of cert in *Rowley* should not deter this Court from granting cert in this case. One issue before the Court in *Rowley* did involve Judge Brodrick's erroneous use of the definition of free appropriate education as used in the Rehabilitation Act, but other than that the issues and the facts were totally different. The issue before the *Rowley* court was whether or not the refusal to provide Amy Rowley, who is hard of hearing and not profoundly deaf, with a sign language interpreter in the classroom was erroneous.[1] The issue here is whether Sherry Grace should be educated in a one-on-one environment or as either a day or dormitory student in a residential school.

Not only are the issues different, but the facts between Sherry and Amy are different. Amy has residual hearing, she is an excellent lip reader, can benefit by amplification

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[1]Sherry has been furnished an interpreter in a classroom and the situation did not work and is now being furnished a certified teacher of the deaf in a one-on-one enviroment.

and can pick up 59% of the things going on around her in the classroom without an interpreter. Sherry, on the other hand, has no residual hearing, benefits not at all by amplification, cannot lip read and can pick up nothing in a classroom without an interpreter.

Amy, unlike Sherry, can communicate by speaking, lip reading and the use of hearing aids and is able to help her classmates with school assignments. Amy entered school with a much better ability to communicate and receive information and to establish social contacts than most deaf children possess, and, unlike Sherry, Amy has done well in the regular classroom. In addition, both of Amy's parents are deaf, and they sign proficiently while neither of Sherry's parents are deaf and neither one sign proficiently and, in fact, Mr. Grace does not sign at all. There is no similarity whatsoever between Amy and Rowley and Sherry Grace, either in the academic arena or in the home environment.

In addition, the *Rowley* case and this case differ in that in this case additional issues before the Court are whether or not a one-on-one environment is proper and satisfies the requirements of the Education for All Handicapped Children's Act and further whether or not state law is applicable in certain situations in the application of the act and, if so, to what extent. Neither of these issues are raised in *Rowley*.

The second new argument raised is the application of the Rehabilitation Act, and petitioner would submit for the reasons set forth in its original brief in pages 7-10 that the acts' purposes are different. The Rehabilitation Act is an older act which was passed for a much broader purpose. The EHA is limited in application to the education of handicapped children. This specific act should govern over the broad general principles of the Rehabilitation Act if there is, in fact, any conflict between the two.

Of equal importance, the Rehabilitation Act was not raised timely in the lower court and was not considered by either the district court or the court of appeals and should not be considered by this Court.

2.

DID THE CIRCUIT COURT ERR IN HOLDING THAT TO EDUCATE A CHILD IN A ONE-ON-ONE EDUCATIONAL ENVIRONMENT IS A FREE APPROPRIATE PUBLIC EDUCATION AND FURTHER THAT SUCH AN ARRANGEMENT SATISFIES THE MAINSTREAMING REQUIREMENTS OF THE EDUCATION FOR ALL HANDICAPPED CHILDREN'S ACT?

As to Point 2, the respondent raises three new arguments: (1) that the school has failed to furnish the necessary continuum of alternative placements; (2) that placement in a residential program (erroneously referred to as an institutional program in respondent's brief. For difference, please see 45 C.F.R. 121a.551(b)(1), appearing at page A-129 of the petition.) would have harmful effects on Sherry; (3) that the standard of "merely appropriate education" set forth by the district court is sufficient under the act since things other than "academics" are to be considered.

The continuum of alternative placements referred to in the regs include instruction in the regular classroom, special classes, special schools, home instructions and instructions in hospitals and institutions (45 C.F.R. 121a.551 (b)(1)).

The duty is placed on the public agency, which includes the state as well as the school, to furnish a continuum of placements, and the *only* placement which has been furnished by the State of Arkansas is the Arkansas School for the Deaf. The Springdale School District has furnished a

continuum of alternative placements, but Sherry's situation simply requires placement at the Arkansas School for the Deaf at this time of her life.[2]

Sherry needs a modified curriculum with slower pacing than nonhandicapped children and needs a certified teacher of the deaf and, therefore, can only be education in a separate classroom. This is not mainstreaming under the act and certainly is much more restrictive than placing her in a residential school either as a dormitory or a day student.

The respondent cites 45 C.F.R. 121a.552(a)(3) for the proposition that Sherry should be educated close to home. That statement is limited by Subsection (d) of the reg, which states *harmful effects must be considered.* The respondent, in its brief, refers to this regulation and states that harmful effects will occur if Sherry is placed in a residential school. However, respondent sets forth no harmful effects. But numerous harmful effects were noted in the testimony given at the trial and the due process hearing concerning the effects of Sherry's being placed in a situation with people with whom she cannot communicate or in a one-on-one environment where she would be alone except for lunch recess and P.E. and then with students who had no signing abilities and with whom she cannot meaningfully interact.

Dr. Merv Garretson, previously referred to in the original brief who not only is a deaf educator but who is himself deaf, stated that if Sherry were educated in an environment where there were little or no communications

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[2]The school has attempted to educate Sherry in a regular classroom, a regular classroom with support services, a regular classroom with an interpreter, and none of these options have worked. The service now being furnished to Sherry is a special classroom, to-wit, a one-on-one situation with a certified trained teacher of the deaf. For the reasons stated in the original brief and hereafter stated, that environment is not appropriate.

between herself and other students because of their inability to communicate that:

> "Not only would it not be of any benefit, but it might be harmful to her self-identity and create a feeling of loss and not belonging and give her a negative concept about herself." (T. 68)

Gary Blake, the Graces' expert, testified that it would not be a good situation to educate Sherry in a one-on-one environment "because children need to be with other children, and especially deaf children so that they can have role models." (T. 331) Dr. Blake stated that he would prefer not to have his child in that type of program. (T. 331-33) Dr. Blake further stated that there were many advantages to be gained from a residential school:

> "I think there is much to be gained. There is a camaraderie among the students that is just super, they have communication, they have friendship, they have fellowship together, they have a great opportunity to compete in scholastic kinds of activities, the extra-curricular activities and, of course, they are in a school environment where all of the teachers, or most of the teachers and staff, would be able to communicate with them to a great or lesser degree, and the entire school is organized to serve these children. That's, that is one advantage." (T. 319)

The respondent, in order to attempt to avoid the clear and irrebuttable fact that Sherry is much better off, at this point in time, at the Arkansas School for the Deaf, attempt to raise the issue that at ASD Sherry will have no interaction with nonhandicapped children. Such an argument is based on *an erroneous fact and an erroneous premise.*

The erroneous fact is that at ASD Sherry would not have the opportunity to interrelate with nonhandicapped

children. This is totally untrue as reflected by all the testimony at trial given by Tom Hicks, the Superintendent of the Arkansas School for the Deaf, and Susan Porter Pack, the principal of the elementary school.

Susan Pack testified that the children at the lower school had field trips, had people come for assembly programs and present information to the children and had visits to other schools. (T. 132)

Tom Hicks, in his testimony at the due process hearing on November 7, 1979, testified that there were many activities involving deaf children with hearing children, including parties such as Valentine, Halloween and skating parties and that on occasion nonhandicapped children were involved.

He testified concerning a full day exchange program that took place with a private school in Little Rock with children that are hearing. His testimony was:

> "They came and spent the day at the school and attended classes with the children and they are now writing the children. This is one example. We have parties at Christmas in conjunction like the high schools give parties for the children. We also are making an effort for our children to do for others in going to nursing homes and giving parties . . .(D. 104-5)*

He further stated that while the Cub Scout troop and the Boy Scout troops were not integrated with nonhandicapped children as far as the troops themselves that the troops had pack meetings and campouts with hearing children. (T. 105)

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*"D" page references pertain to testimony appearing in the transcript of the Due Process Hearing at administrative level.

"T" references pertain to transcript pages of Trial in District Court.

Tom Hicks also testified that in the sports activities that that School for the Deaf competes against hearing students in athletics (D. 109) and that there are full sports programs in football, basketball, with complete schedules for both boys and girls (D. 121 and 122) and that with the exception of one deaf school which they attempt to schedule each year in football all the football games are with hearing schools and are played in the regular AAAAA conference. (D. 122)

The children at the School for the Deaf participate in the American Legion Boys State and Girls State (D. 121), and just the year before this hearing a young lady from the School for the Deaf was elected Lt. Governor of Girls State. (D. 121)

The students from the School for the Deaf also compete in the State Mathematics Contest with hearing children, and for the last three years in a row a deaf child has been in the top ten in the state contest and in 1977 the Deaf School had the top math student in the entire state. (D. 123) The School has its own FHA, VICA and DECA programs, and they intermingle with hearing children in their own federation as much as other FHA, VICA and DECA units intermingle. (D. 139) Not only is there constant intermingling among other children, both handicapped, those present at the school, and nonhandicapped, those present in the programs set forth, but there is intermingling with adults on a meaningful basis who are able to sign. Tom Hicks stated that a calendar was put out for each week so that the children would have an idea of what would be included and they include such things as:

> "We put out a calendar every week of everything that is going to happen. There would be organized free play. There would be individual activities, arts, crafts, these kinds of things. There would be individual quiet time. There would be individual

time with the house parents themselves. We are now cooperating with the University of Arkansas interpreter training program. They are sending people over to do TV interpreting for the kids. It is really interesting, if you have never seen Charlie's Angels interpreted; it is nice. We are using a lot of this interpreting with the TV. We have hikes. All of our home life people are certified bus drivers. They are permitted to take the kids shopping, to parties. So all of these kinds of things. We have our own captioned movies. The entertainment movies come to us for free. They get to see a free full length captioned movie every weekend. All these kinds of things are part of it." (D. 140)

The erroneous premise is that Sherry can communicate meaningfully with nonhandicapped children at Springdale. As mentioned previously, *proximity does not equal integration,* and the children at Springdale cannot sign and Sherry cannot speak. Therefore, there is no meaningful interaction.

Testimony from all the experts was that signing is not something that can be picked up easily but takes years in which to acquire any type of proficiency or ability to communicate (Tom Hicks' Testimony, T. 95-96) Mr. Hicks went on to say that signing is not something that a child could pick up in a classroom on an occasional basis but that it cannot be picked up "without some kind of formal instruction and knowing exactly where they are going with it." (T. 96)

This testimony was corroborated by Merv Garretson who stated that people can pick up very quickly some *isolated signs, single words,* but to become fluent and to be able to communicate with other people, it takes at least three to five years, and it is necessary to constantly be among people who are skilled signers. (T. 32)

Education requires interaction, and Sherry will have no meaningful interaction with nonhandicapped children, or for that matter, with handicapped children in her one-on-one environment since she will not be able to communicate with students, her principal, the administrators or school counselors unless her certified teacher for the deaf is with her. This is simply a sentence to a life of educational isolation and is not required or allowed by the act. Not only is Sherry deprived of true academic exposure, but she is deprived of academic competition recognized as so important in *Age v. Bullitt*, 3 E.H.L.R. 551:505.

In the area of camaraderie with fellow students, handicapped or otherwise, Sherry is totally deprived of the camaraderie recognized by all of the experts who testified to be so important.

Most importantly, time after school for Sherry in communication with others will be nonexistent. Her mother possesses a limited ability to sign, but no other family member, including her father, can sign. At the Arkansas School for the Deaf, Sherry would have numerous children with whom she could sign and communicate.

3.

DID THE COURT ERR IN HOLDING THAT THE ARKANSAS ACT FOR THE EDUCATION OF ALL HANDICAPPED CHILDREN, ARK. STAT. 80-2114 THROUGH 80-2139 WAS IRRELEVANT AND COULD NOT BE CONSIDERED IN LIGHT OF THE ADOPTION OF THE FEDERAL STATUTE?

The Attorney-General raises no new issues here other than to argue the same "unenumerated harmful effects" that would make the state law inapplicable. As mentioned in the preceding point, not one harmful effect is noted in respondent's brief.

CONCLUSION

As stated by Dr. Merv Garretson, education includes more than the classroom:

> "I learned that if you look at a total year of 365 days, children in general are in school 8% of the time and out of school 92% of the time. That means that most of their education is acquired through teachers like TV, radio, parents, friends, doctors, storekeepers, so forth, not in the classroom. That is why a residential school that understands a curriculum takes into account what happens outside of school as well as what happens inside a school, and this is very important." (T. 19-21)

It is vitally important that children be placed in the appropriate educational environment at an early age so these vital formative years will not be wasted. Two years of Sherry's life have already been wasted in shopping around. Petitioner begs the Court not to waste a third and to, therefore, grant cert in this case not only for Sherry's sake but, more importantly, for the hundreds of thousands of handicapped children living in our country.

Respectfully submitted,

SPRINGDALE SCHOOL
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